# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted] 272

THE STATE OF OHIO EX REL. JAMES CLARKE, PLAINTIFF IN ERROR,

*vs.*

ALFRED F. DECKEBACH, AS AUDITOR OF THE CITY OF CINCINNATI

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

FILED JANUARY 20, 1926

(31,625)

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1925

## No. 902

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*vs.*

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO

INDEX


| | Original | Print |
|---|---|---|
| Proceedings in supreme court of Ohio | 1 | 1 |
| Return to writ of error (omitted in printing) | 1 | |
| Petition for writ of error | 2 | 1 |
| Assignments of error | 3 | 2 |
| Order allowing writ of error | 4 | 3 |
| Writ of error | 5 | 4 |
| Waiver of issuance and service of citation (omitted in printing) | 6 | |
| Praecipe for transcript of record | 7 | 5 |
| Bond on writ of error (omitted in printing) | 8 | |
| Petition for mandamus and praecipe for summons | 10 | 6 |
| Alternative writ of mandamus and sheriff's return | 15 | 9 |
| Answer | 23 | 10 |
| Motion for judgment on the pleadings | 26 | 12 |
| Docket entries | 27 | 12 |
| Journal entry of order allowing alternative writ of mandamus | 29 | 14 |
| Journal entry of judgment | 29 | 14 |
| Certificate of lodgment (omitted in printing) | 30 | |
| Clerk's certificate (omitted in printing) | 31 | |
| Opinion, Marshall, J. | 32 | 15 |
| Statement of points to be relied upon and designation by plaintiff in error of parts of the record to be printed | 39 | 20 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 26, 1926

[fol. 1] Return to writ of error omitted in printing.

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[fol. 2] **IN SUPREME COURT OF OHIO**

No. 19154

THE STATE OF OHIO ex Rel. JAMES CLARKE, Relator,

vs.

ALFRED F. DECKEBACH, as Auditor of the City of Cincinnati, Respondent

PETITION FOR WRIT OF ERROR—Filed January 7, 1926

To the Hon. C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio:

Now comes James Clarke, a subject of the King of England, and alleges that as Relator he brought an original action in mandamus in the Supreme Court of Ohio, against the Auditor of the City of Cincinnati, seeking to compel said auditor to accept from relator the prescribed fee and issue to relator a license to operate billard tables in said city.

That in said original cause on October 13th, 1925 a final judgment was rendered against your petitioner by the Supreme Court of Ohio, that being the highest court of law or equity in the State of Ohio, wherein it was adjudged that the motion of relator for judgment on the pleadings be overruled and that the writ of mandamus prayed for be denied. The Supreme Court of Ohio holding that the enactment of the ordinance of the City of Cincinnati providing that no license to operate a billard table shall be granted to a person who is not a citizen of the United States was within the power of said city. That the ordinance was a valid one and that it was not in conflict with the equal protection clause of the Fourteenth Amendment of the United States Constitution, and that said ordinance did not violate any provision of any treaty of Great Britain with the United States.

In each and all of which rulings and judgments said Supreme Court of Ohio erred to the prejudice of plaintiff in error.

All of which appears in the record, opinion and final judgment of said Supreme Court of the State of Ohio.

Wherefore your petitioner prays for an allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States, and the errors complained of by your petitioner may be examined and corrected and said judgment reversed; and your petitioner will ever pray.

George S. Hawke, Attorney for James Clarke.

The writ of error as prayed for in the foregoing petition is hereby allowed this 7 day of January, 1926, and said petitioner is ordered to give bond to cover the costs in this action in the amount of Two hundred dollars.

Dated at the City of Columbus, Ohio, this 7th day of January, 1926.

Carrington T. Marshall, Chief Justice Supreme Court of the State of Ohio.

[fol. 2a] [File endorsement omitted.]

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[fol. 3] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 7, 1926

Now comes the relator in connection with the petition for a writ of error herein and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio, in the above entitled action, there is manifest error in this, to-wit:

First. The judgment of the Supreme Court of Ohio in this cause is repugnant to and in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United

States, which declares that no person shall be denied the equal protection of the law, by any state.

Second. The Supreme Court of Ohio erred in holding that the Ordinance of the City of Cincinnati which provides for the Licensing of Billiard and Pool Tables, but denies a license to any person who is not a citizen of the United States, was a valid ordinance.

Third. The Supreme Court of Ohio erred in holding that the ordinance of the City of Cincinnati which limited the issuance of billiard table licenses to citizens of the United States only, did not violate the provisions of the treaties of Great Britain with the United States specifically or generally under the "national treatment" or "most favored nation" clauses, the relator invoking their protection as a subject of the King of England.

Fourth. The Supreme Court of Ohio erred in overruling relator's motion for a judgment in his favor on the pleadings and in denying him the writ of mandamus for which he prayed.

Wherefore the petitioner prays that the errors complained of may be examined and corrected and the said judgment of the Supreme Court of Ohio reversed and said cause remanded as provided by law; and that the petitioner may have such other and further relief in the premises as may be just; and your petitioner will ever pray.

George S. Hawke, Attorney for Petitioner.

[fol. 3a] [File endorsement omitted.]

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[fol. 4] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Jan. 7, 1926

The above entitled cause coming on to be heard upon the petition of the relator therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio, and upon examination of said petition

and the record in said case, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said case,

It is ordered that a writ of error be and the same hereby is allowed to this court from the Supreme Court of the United States and that the bond presented by said petitioner be, and the same is, hereby approved.

Columbus, Ohio, January 7, 1926.

C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 4a] [File endorsement omitted.]

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[fol. 5] In Supreme Court of Ohio

[Title omitted]

Writ of Error—Filed January 7, 1926

The United States of America, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of judgment, of a plea which is in the said Supreme Court of the State of Ohio, before you or some of you, being the highest court of law or equity of said State in which decision could be had in the said suit between State of Ohio, ex rel. James Clarke, as Relator, and Alfred F. Deckebach, as Auditor of the City of Cincinnati, as Respondent, wherein was drawn in question the validity of an ordinance of said city in said State of Ohio, and an authority exercised under said ordinance of said city in said state on the ground of its being repugnant to the provisions of the Constitution of the United States and the amendments thereto, and said decision was in favor of such, its validity, a manifest error hath happened, to the great damage of the said State of Ohio, ex rel. James Clarke, Relator, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th day of February, 1926, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, the 7th day of January, in the year of our Lord 1926.

Harry F. Rabe, Clerk of the United States District Court for the Southern District of Ohio, Eastern Division, by G. C. Cropper, Deputy.

Allowed: Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 5a] [File endorsement omitted.]

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[fols. 6 & 6a] Waiver of issuance and service of citation, filed January 12, 1926, omitted in printing.

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[fol. 7] IN SUPREME COURT OF OHIO

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed January 7, 1926

To the Clerk of the Supreme Court of Ohio:

You are hereby directed to prepare a transcript of, certify and transmit to the Clerk of the Supreme Court of the United States the entire record in this cause, together with all pleadings and papers filed in this court.

George S. Hawke, Attorney for Relator.

[fol. 7a] [File endorsement omitted.]

[fols. 8 & 9] Bond on writ of error for $200.00, approved and filed January 16, 1926, omitted in printing.

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[fol. 10] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION FOR MANDAMUS AND PRAECIPE FOR SUMMONS—Filed May 19, 1925

The relator says that he is now and at all times hereinafter mentioned has been a subject of the King of England; that relator has resided in the City of Cincinnati, and in the County of Hamilton, and in the State of Ohio for some years past.

Relator says that he brings this action on his own behalf, and also on behalf of all other aliens of every nationality residing in the State of Ohio and elsewhere in the United States who are similarly situated.

That the respondent Alfred F. Deckebach is the duly elected, qualified and acting Auditor of the City of Cincinnati.

That it is the duty of the respondent, as said Auditor, to receive application for and to issue pool and billiard table license for the year 1925 for five tables at 1413 Central Avenue, Cincinnati.

That the respondent refused to receive such application, and a license was denied to relator for the sole and only [fol. 11] reason that the relator is an alien, being a subject of the King of England, and because of the provision of an Ordinance No. 76-1918 of the City of Cincinnati, to the effect that no license for a pool or billiard table shall be granted to a person who is not a citizen of the United States.

Relator says that on February 26th, 1918, the Council of the City of Cincinnati passed an ordinance, a copy of which is as follows:

An Ordinance, No. 76-1918, "Providing for the Licensing of Billiard and Pool Tables by Amending Original Section 777 of the Code of Ordinances of the City of Cincinnati."

Be it ordained by the Council of the City of Cincinnati, State of Ohio:

Section 1. That original Section 777 of the Code of Ordinances of the City of Cincinnati be and the same is hereby amended to read as follows:

Section 777. Billiard Table, etc.—Each proprietor of a billiard or pool table shall pay a license of twenty-five ($25.00) dollars per annum for one such table and fifteen ($15.00) dollars per annum for each additional table; provided however that no license shall be granted to a person who is not a citizen of the United States.

Section 2. That said original Section 777 of the Code of Ordinances be and the same is hereby repealed.

Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed February 26th, A. D. 1918.

Carl M. Jacobs, Jr., Vice-Mayor.

[fol. 12] Attest: Fred Schneller, Clerk.

Approved: John Galvin, Mayor.

February 28, 1918.

Relator says that he has a clear legal right to secure a license to operate pool and billiard tables in Cincinnati as well as has a citizen of the United States, and that neither he nor any other alien residing in the United States has any adequate remedy at law.

That said Ordinance of said City is in violation of and contrary to the treaties of commerce between the United States and Great Britain now in full force and effect; that the protection of the provisions of said treaties and especially the "national treatment" and "most favored nation" clauses thereof are hereby invoked by this relator, for himself and for all other aliens similarly situated.

Relator insists that by virtue of said treaties the respondent cannot lawfully refuse to grant relator a pool and billiard table license for said location in Cincinnati.

That said Ordinance No. 76-1918 is void and in contravention of Section One of the Fourteenth Amendment to

the Constitution of the United States, in that it denies to him and other aliens the equal protection of the law. The protection of the provisions of said Amendment is hereby especially invoked by this relator and by all other aliens of the class with relator on whose behalf this action is brought, and relator insists that by virtue thereof the respondent cannot lawfully deny to him or any other alien residing in the United States a pool or billiard table license in the City of Cincinnati.

That the relator always has been and now is willing and [fol. 13] ready to comply with any valid or constitutional ordinance of the City of Cincinnati respecting pool and billiard table licenses, and at all times has been and now is willing and ready to pay any valid license fee which the City of Cincinnati shall enact for the purpose, and at any time hereafter will so comply with said ordinance and make such payments.

Wherefore relator prays that he may secure the clear legal right to operate pool and billiard tables in Cincinnati upon payment of valid fees, and that all other aliens of the class with relator may also be granted relief; that the respondent as Auditor of the City of Cincinnati may be compelled to issue a pool and billiard table license to relator as set forth in this petition; that a writ of mandamus may be forthwith awarded commanding the respondent to accept the application of relator and the stipulated license fee, and issue a pool and billiard table license to relator; and for such other and further relief as the nature of the case may require.

George S. Hawke, Attorney for Relator.

*Duly sworn to by James Clark. Jurat omitted in printing.*

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[fol. 14] PRÆCIPE

Issue summons to the Sheriff of Hamilton County, Ohio.
G. S. Hawke, Attorney for Relator.

[File endorsement omitted.]

[fol. 15] IN SUPREME COURT OF OHIO

[Title omitted]

ALTERNATIVE WRIT OF MANDAMUS AND SHERIFF'S RETURN—Filed May 22, 1925

STATE OF OHIO,
City of Columbus, ss:

To the Sheriff of Hamilton County, Ohio, Greeting:

You are hereby commanded to serve Alfred F. Deckebach, as Auditor of the City of Cincinnati, the respondent above named, with a copy of the following writ and make return of said writ and your action in the premises to this court on or before the 1st day of June, 1925:

To Alfred Deckebach, as Auditor of the City of Cincinnati:

Whereas, the following petition and the order of the allowance of an alternative writ of mandamus have been filed in and made by the Supreme Court of Ohio, copies of which are hereto attached to wit:

[fols. 16-20] Petition for mandamus and præcipe for summons omitted; printed side page 10 ante.

[fol. 21] [Title omitted]

Order Allowing Alternative Writ of Mandamus

This day came the relator, and made application for the allowance of a writ of mandamus herein; and, on consideration thereof, the court allow an alternative writ to issue against the respondent, Alfred F. Deckebach, as Auditor of the City of Cincinnati, returnable to this Court on the 13th day of June, 1925.

And it is ordered that the said Alfred F. Deckebach, immediately upon the service of this writ, accept the application of the said James Clarke for a pool and billiard table license and issue a license to him, or that at the time and place of the return of this writ said respondent shall show cause why he has not done so.

Enter:

C. T. Marshall, C. J.

[fol. 22] Now, therefore, in order that full and speedy justice should be done in the premises, we do command you that immediately upon receipt of this writ, you comply with the order of our Court as hereinbefore stated, or that you appear before the Supreme Court of Ohio, in the City of Columbus, on the 13th day of June, 1925, to show cause why you have not done so and have you then and there this writ.

Witness my hand and the seal of said court this 19th day of May, 1925.

Seba H. Miller, Clerk of the Supreme Court of Ohio.
(Seal.)

Cincinnati, Ohio, May 20, 1925.

Served the within named Alfred F. Deckebach, as Auditor of the City of Cincinnati, by delivering to him personally a true copy of this writ with all the endorsements thereon.

Richard B. Witt, Sheriff of Hamilton County, Ohio,
by Harry Tegeler, Deputy.

Sheriff Fees:

| | |
|---|---|
| Service and return | .75 |
| Mileage | .16 |
| Total | .91 |

[File endorsement omitted.]

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[fol. 23] IN SUPREME COURT OF OHIO

[Title omitted]

ANSWER—Filed June 10, 1925

Now comes the respondent and admits that he is the duly elected, qualified and acting auditor of the City of Cincinnati, and that as such Auditor it is his duty to receive applications for and to issue pool and billiard table licenses in the City of Cincinnati, which duty is enjoined upon him by virtue of the ordinances of said City.

Respondent further admits that on or about the 22nd day of April, 1925, the relator made application to him, as Auditor of the City of Cincinnati, for a pool and billiard table license for the year 1925, and that the respondent refused to receive such application and to issue such license.

Respondent further admits that on the 26th day of February, 1918, the Council of the City of Cincinnati passed Ordinance No. 76-1918, a copy of which is set forth in the petition of the relator.

The respondent states that he has no personal knowledge that the relator was at the time said application was made a subject of the King of England, and for lack of knowledge, therefore, denies that the relator is a subject [fol. 24] of such King, although respondent admits that he refused to receive said application and issue such license, by reason of the statement of the relator to this respondent that he was a subject of the King of England.

Respondent denies each and every other allegation in the petition of the relator contained.

Further answering respondent says that pool and bill-ard rooms and halls in the City of Cincinnati are and have been meeting places of idle and vicious people; that they have and are means of contributing to juvenile delinquincy; that numerous crimes and defenses against the laws of the State of Ohio and the ordinances of the City of Cincinnati have been committed therein; that such places are frequented by law-breakers and an undesirable class of persons; and that by reason thereof pool and billard rooms and halls are required to receive the most strict surveillance of the Police Department of the City of Cincinnati.

Respondent further says that as a class, persons who are not citizens of the United States are not as familiar with the laws and customs of the United States as are native born or naturalized citizens thereof, and that billard and pool rooms and halls maintained by persons who are not citizens of the United States are, therefore, a menace to society at large and the welfare of the public; that the ordinance complained of by the relator is a reasonable police regulation passed in the interests and for the benefit of the general public; and that said ordinance is a reasonable ordinance.

Wherefore respondent says that the petition of the re-
[fol. 25] lator should be dissmissed, and that upon a hearing of this cause the writ prayed for by the relator should be denied to him.

Frank K. Bowman, City Solicitor. L. L. Forchheimer, Assistant City Solicitor.

*Duly sworn to by Alfred F. Deckebach. Jurat omitted in printing.*

[File endorsement omitted.]

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[fol. 26] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR JUDGMENT ON THE PLEADINGS—Filed June 18, 1925

Now comes the relator and moves the Court for a judgment in his favor on the pleadings herein.

George S. Hawke, Attorney for Relator.

Authority in Support of Motion.

State ex rel, Murphy Co. vs. Donahey, State Auditor, 98 Ohio State, 442.

State rel, Hawke vs. Le Blond, Judge, 108 Ohio State, 126.

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[fol. 27] IN SUPREME COURT OF OHIO

[Title omitted]

DOCKET ENTRIES

1925.

May 19. Petition for alternative writ of mandamus filed.

" 19. Order allowing alternative writ of mandamus returnable June 13, 1925. C. T. Marshall, C. J. J. 30 P. 264.

" 19. Alternative writ of mandamus issued for defendant, to Sheriff of Hamilton County, Ohio, returnable June 1, 1925, Sent by registered mail. P. O. receipt No. 75215.

May 22. Summons returned and filed, endorsed: "Cincinnati, Ohio, May 20, 1925, Served the within named Alfred F. Deckebach, as Auditor of the City of Cincinnati, by delivering to him personally a true copy of this writ with all the endorsements thereon. Fees $0.91. Richard B. Witt, Sheriff of Hamilton County, Ohio, by Harry Tegeler, Deputy."

June 10. Answer of respondent (2 copies) filed.

" 13. Seven additional copies of Answer filed.

" 18. Motion by relator for judgment on the pleadings filed.

" 20. Proof of service filed.

[fol. 28]

Aug. 5. Brief of relator on motion for judgment on pleadings and proof of service filed.

Sep. 28. Printed briefs of respondent opposing motion for judgment on the pleadings and proof of service filed.

Oct. 13. Judgment for Respondent. J. 30 P. 353.

" 20. Certified copy of entry and cost bill sent to Attorney for relator.

1926.

Jan. 7. Petition for writ of error from U. S. Supreme Court of Ohio, allowed by Marshall, C. J. filed.

" 7. Order allowing writ of error filed.

" 7. Assignment of error filed.

" 7. Precipe as to transcript of record filed.

" 7. Writ of Error filed.

" 12. Waiver of issuance of service of citation and entry of appearance of respondent, filed.

[fol. 29] IN SUPREME COURT OF OHIO

[Title omitted]

JOURNAL ENTRY OF ORDER ALLOWING ALTERNATIVE WRIT OF MANDAMUS

1925.

May 19. "This day came the relator, and made application for the allowance of a writ of mandamus herein; and, on consideration thereof, the court allow an alternative writ to issue against the respondent, Alfred F. Deckebach, as Auditor of the City of Cincinnati, returnable to this Court on the 13th day of June, 1925. And it is ordered that the said Alfred F. Deckebach, immediately upon the service of the writ, accept the application of the said James Clarke for a pool and billiard table license and issue a license to him, or that at the time and place of the return of this writ said respondent shall show cause why he has not done so." Enter C. T. Marshall, C. J. Journal 30, Page 264.

JOURNAL ENTRY OF JUDGMENT

Oct. 13. "This cause came on to be heard upon the motion for judgment on the pleadings and was argued by counsel. On consideration whereof it is ordered and adjudged that said motion be sustained, for the reasons stated in the opinion filed in this case. It is therefore ordered and adjudged that the writ of mandamus prayed for be and the same hereby is denied and judgment is rendered in favor of respondent. It is further ordered and adjudged that the relator James Clarke pay the costs herein, taxed at $—, for which execution is awarded." Journal 30, Page 353.

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[fol. 30] Certificate of lodgment omitted in printing.

[fol. 31] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 32] IN SUPREME COURT OF OHIO

[Title omitted]

OPINION

Municipal corporations—Ordinance regulating pool and billiard rooms—Aliens denied licenses—Constitutional law—Operation of pool room not "carrying on a trade"—Commercial treaty between United States and Great Britain not violated.

1. A municipal ordinance purporting to regulate and license pool and billiard rooms, which contains a provision that "no license shall be granted to a person who is not, by reason of such provision, a citizen of the United States," is not in conflict with any provision of the state or federal Constitution. (State ex rel. Balli v. Carrel, Aud., 99 Ohio St., 285, 124 N. E., 129, approved and followed.)

[1.] Licenses, 37 C. J., Sec. 56.

2. The operation of a pool and billiard room is not "carrying on a trade" within the meaning of the commercial treaty between the United States and Great Britain, and such ordinance does not therefore violate any of the provisions of that treaty.

[2.] Treaties, 38 Cyc., p. 978.

(No. 19154—Decided October 13, 1925)

In Mandamus

The relator is a subject of Great Britain, residing in the city of Cincinnati, Ohio, for several years last past. The city of Cincinnati has passed an ordinance licensing billiard and pool tables, which contains a provision that no license shall be granted to a person who is not a citizen of the United States. Relator made regular application for a license, and was refused on the ground of being an alien. He bring this

action in mandamus to compel the proper authorities to [fol. 33] issue such license, and alleges that the ordinance is a violation of commercial treaties between the United States and Great Britain and a denial of equal protection of the laws guaranteed by the Fourteenth Federal Amendment. The respondent has answered, admitting the application and refusal on the ground of relator being an alien, and further alleging:

"That pool and billiard rooms and halls in the city of Cincinnati are and have been meeting places of idle and vicious people; that they have been and are a means of contributing to juvenile delinquency; that numerous crimes and offenses against the laws of the state of Ohio and the ordinances of the city of Cincinnati have been committed therein; that such places are frequented by lawbreakers and an undesirable class of persons, and that, by reason thereof, pool and billiard rooms and halls are required to receive the most strict surveillance of the police department of the city of Cincinnati."

Respondent further says that as a class "persons who are not citizens of the United States are not as familiar with the laws and customs of the United States as are native born or naturalized citizens thereof, and that billiard and pool rooms and halls, maintained by persons who are not citizens of the United States, are therefore a menace to society at large and the welfare of the public."

No reply has been filed, and, upon the issues joined by the petition and answer, relator moves for judgment upon the pleadings.

Mr. George S. Hawke for relator.

Mr. Frank K. Bowman, city solicitor, and Mr. Landon [fol. 34] L. Forchheimer, assistant city solicitor, for respondent.

Marshall, C. J.:

This record puts in issue the validity of the city ordinance and challenges the power of the legislative branch of the city government to deny to aliens a license to operate pool and billiard tables. This ordinance was challeged in a

former proceeding in this court, entitled State ex rel. Balli v. Carrell, aud., 99 Ohio St., 285, 124 N. E., 129, in which this court held that it was not in conflict with any provision of the state or federal Constitution. In this proceeding it is sought to have the principle in that case overruled, and as grounds therefor it is urged that a recent case decided by the Supreme Court of the United States is in conflict therewith, being the case of Asakura v. City of Seattle, 265 U. S., 332, 44 S. Ct., 515, 68 L. Ed., 1041. Balli was a subject of Greece, and the license was denied to him because of his being an alien and a subject of Greece. The United States Supreme Court case, above referred to, involved a subject of Japan, and involved consideration of the treaty between the United States and Japan, proclaimed April 5, 1911 (37 U. S. Stat., 1504). That treaty contained a provision as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, * * * and generally to do anything incident to or necessary for [fol. 35] trade upon the same terms as native citizens or subjects * * *." Article I.

Asakura was a pawnbroker, and the Supreme Court of the United States decided that the occupation of pawnbroker was carrying on "trade," and that to deny the right to conduct his business as pawnbroker would be a denial of his right to carry on trade.

It is claimed by counsel for the respondent that the case is materially different from the Asakura case, because of relator being a subject of Great Britain. A careful examination and comparison of the two treaties discloses that, while the language is greatly different in form, it is not materially different in substance. Both are commercial treaties, both are negotiated for the purpose of protecting merchants and traders who may occupy real estate for the purpose of carrying on trade and commerce. The treaty with Great Britain contains the following provision:

"The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships

and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively." (8 Stat. U. S., 228, Article I.)

It is claimed that the last clause thereof materially [fol. 36] affects the situation. It would seem more reasonable to construe that clause as intending to refer only to such laws and statutes as do not unlawfully discriminate against aliens who are entitled to the general benefits of the treaty.

The treaty does protect merchants and traders, and if Clarke is a trader he is entitled to protection as such. The word "trade" has a well-settled meaning in commerce, which has been adopted by courts generally as the business of the purchase and sale or exchange of goods, wares, and merchandise. In re Hudson River Elec. Power Co. (D. C.), 173 F., 934, 947; Jackson v. Town of Union, 82 Conn., 266, 73 A., 773.

In the case of May v. Sloan, 101 U. S., 231, 25 L. Ed., 797, the Supreme Court of the United States has given a definition which must be accepted as conclusive in the instant case, inasmuch as a federal question is involved. At page 237 of the opinion we find the following:

"The word 'trade,' in its broadest signification, includes, not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally."

Measured by this definition, the operator of a pool room is not a trader, and it must therefore be concluded that this ordinance does not violate the terms of treaties between the United States and Great Britain. It remains to be determined whether the ordinance is a valid piece of legislation, and whether it violates the guaranty of the equal protection of the laws.

This record raises no issue concerning the personal character of the relator. We are not called upon to determine [fol. 37] whether the relator has personal qualities which deny him the right to operate a pool table in the city of Cincinnati, but, on the contrary, we are only called upon to determine whether the class to which he belongs may properly be excluded from such occupation. The answer contains allegations about the character of pool rooms and of the lack of knowledge on the part of aliens concerning our laws and institutions. It is not our purpose to consider these allegations as reflecting upon the character of this relator, but we cannot ignore those allegations in determining the validity of the municipal legislation. Whether or not those allegations correctly state the character of pool rooms and the state of mind of subjects of foreign countries, the motion for judgment upon the pleadings assumes the truth of all those allegations. This legislation is enacted in the exercise of the police power, and its validity is therefore a political question, except that this court may consider as a justiciable question whether it is a reasonable exercise of such power. Under the well-settled rules which have heretofore been declared by this court, we may not declare that legislation invalid unless it has no reasonable relation to the public morals, public health, public order, and the peace and tranquility of the municipality. In view of the allegations of the answer, admitted as they are by the motion for judgment upon the pleadings, we are unable to find the legislation unreasonable. It has been decided in Schmidinger v. Chicago, 226 U. S., 578, 33 S. Ct., 182, 57 L. Ed., 364, Ann. Cas., 1914B, 284, that a municipality may regulate one trade and not another, and that this is not forbidden by the prohibition of [fol. 38] the Fourteenth Federal Amendment. That case is not strictly in point in deciding the instant case, because the city of Cincinnati in its regulation of the business of operating a pool room has withheld rights from aliens which are granted to citizens. The pertinent question therefore is whether, in any business other than trading, such discriminations are invalid as in violation of the Fourteenth Federal Amendment. It has been held by this court, in Bloomfield v. State, 86 Ohio St., 253, 99 N. E., 309, 41 L. R. A., (N. S.), 726, Ann. Cas., 1913D, 629, that a

license to traffic in intoxicating liquors might be withheld from aliens, though it would be granted to residents. In Heim v. McCall, 239 U. S., 175, 36 S. Ct., 78, 60 L. Ed., 206, Ann. Cas., 1917B, 287, it was held that the labor law of 1909 of New York state (Laws 1909, c. 36 [Consol. Laws, c. 31]), which discriminated against aliens in the matter of employment on the public works, was not unconstitutional.

Measured by these standards, and having in mind the admitted allegations of the answer, the conclusion must be reached that the discrimination in the instant case does not deny the equal protection of the laws.

The motion for judgment must therefore be resolved in favor of the respondent, and the petition dismissed at relator's costs.

Judgment for respondent.

Jones, Matthias, Day, Allen, Kinkade and Robinson, JJ., concur.

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Reporter's certificate to foregoing paper omitted in printing.

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[fol. 39] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Plaintiff in Error of Parts of the Record to be Printed—Filed February 1, 1926

The City of Cincinnati has provided in Chapter 8 "Licenses" of its Ordinances that "No person shall be engaged in any trade, business or profession * * * unless he * * * shall have obtained a license therefor, as hereinafter provided."

As a part of said Chapter an amended Ordinance was enacted in 1918 (during the World War) requiring a license fee to be paid by each proprietor of a billard table, "provided, however, that no license shall be granted to a person who is not a citizen of the United States."

The amendment consists of the last quoted words, to which exception is taken.

The Realtor, a subject of the King of England, challenges the validity of the provision denying him a license for which he applied, for the sole reason that he is not a citizen of the United States.

Point One

The said provision in said Ordinance of the City of Cincinnati is in violation of and contrary to the treaties of commerce between the United States and Great Britain now in full force and effect; that the protection of the provisions of said treaties and especially the "national treat-
[fol. 40] ment" and "most favored nation" clauses thereof are invoked by the relator for himself and for all other aliens similarly situated.

In May, 1924, the U. S. Supreme Court unanimously held to be invalid an Ordinance of the City of Seattle, (effective July, 1921) for Licensing and regulating the business of pawnbroker," which ordinance provided, "that no license shall be issued unless the applicant be a citizen of the United States," thus reversing the Supreme Court of the State of Washington. Asakura vs. City of Seattle, 265 U. S. 332.

The Seattle Ordinance (enacted in 1921) was pat-erned after the Ordinance of Cincinnati which was enacted in 1918.

| Seattle (1921) | Cincinnati (1918) |
|---|---|
| "That no license (as a pawnbroker) shall be issued unless the applicant be a citizen of the United States." | "No license (to operate billiard tables) shall be granted to a person who is not a citizen of the United States." |

Point Two

That said Ordinance is void and in contravention of Section One of the Fourteenth Amendment to the Constitution of the United States, in that it denies to him and other aliens the equal protection of the law.

Point Three

That the said Ordinance discriminates against the relator and all aliens in favor of naturalized and native born citizens and denies relator a license simply because he is an alien. That the provisions of the Constitution of Ohio re-

quiring that all laws passed by the General Assembly must be of a general nature and have a uniform operation throughout the state, prohibit the council of a municipality from enacting ordinances not of a general nature and which do not have a uniform operation on all classes of persons in the city of Cincinnati.

Requisition

The Clerk will kindly print the whole record, omitting if possible all captions and verifications and unnecessary parts of pleadings.

George S. Hawke, Attorney for Plaintiff in Error,
Cincinnati, Ohio.

[fol. 41] [File endorsement omitted.]

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Endorsed on cover: File No. 31,625. Ohio Supreme Court. Term No. 902. The State of Ohio ex rel. James Clarke, plaintiff in error, vs. Alfred F. Deckebach, as auditor of the city of Cincinnati. Filed January 20th, 1926. File No. 31,625.

FILE
NOV 18
WM. R. STA

No. 272.
OCTOBER TERM, 1926.

# Supreme Court of the United States

THE STATE OF OHIO, ex rel. JAMES CLARKE,
*Plaintiff in Error,*

vs

ALFRED F. DECKEBACH, as Auditor of the City of Cincinnati,
*Defendant in Error.*

In Error to the Supreme Court of the State of Ohio.

## BRIEF OF PLAINTIFF IN ERROR

GEORGE S. HAWKE,
Cincinnati, Ohio,
*Attorney for Plaintiff in Error.*

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# INDEX


| | Page |
|---|---|
| Statement of the Case | 1 |
| Propositions Discussed | 3 |
| The Ordinance Involved | 3 |
| Brief of Argument | 4 |
| *Point 1.* The provision of the Billiard Table License Ordinance of the City of Cincinnati "that no license shall be granted to a person who is not a citizen of the United States," is in violation of and contrary to the Treaty between the United States and Great Britain, of which latter country the Plaintiff in Error is a subject. | |
| a. The Treaty's Protection Determined | 5 |
| b. Definition of the Word "Trade" | 5 |
| c. The Asakura Case | 8 |
| d. An Unlawful Exercise of the Police Power | 8 |
| e. Not One of the Authorities Cited by the Ohio Supreme Court is in Point | 11 |
| *Point 2.* That said License Ordinance is Void and in Contravention of Section One of the Fourteenth Amendment to the Constitution of the United States, in that it denies to the Plaintiff in Error and all other Aliens the Equal Protection of the Law | 15 |
| f. Protection Not Confined to Citizens Only | 16 |
| g. Discrimination Against Aliens Prohibited | 17 |
| *Point 3.* The Ordinance Discriminates Against All Aliens in favor of Naturalized and Native-born Citizens, and denies Plaintiff in Error a License simply because he is an Alien | 20 |
| h. A Lawful Amusement | 20 |
| i. A Lawful Business | 20 |
| j. Not a Nuisance per se | 21 |
| k. Must be a Nuisance in Fact | 21 |
| l. Police Power is subject to Constitutional Limitations | 22 |
| m. Its Exercise is a Judicial Question | 23 |
| n. The Ordinance is Unreasonable | 23 |

PAGE

o. The Classification Sought to be Drawn is purely Arbitrary and Rests upon no Reasonable Basis ..... 24

p. The Ordinance has no Real or Substantial Relation to the Protection of the Public Morals or the Public Welfare ..... 27

q. Valid Ordinances Sometimes Totally Prohibit, but always apply to all persons alike 28

## LIST OF AUTHORITIES CITED

PAGE

Adams v. Tanner, 244 U. S., 590 ..... 22
Allgeyer v. La., 165 U. S., 578 ..... 19
American Sugar Ref. Co. v. La., 179 U. S., 89 ..... 18
Asakura v. City of Seattle, 265 U. S., 332 ..... 4, 8, 15
Atchison, Topeka & Santa Fe Ry. v. Vosburg, 238 U. S., 56 ..... 19
Balli v. Carrell, Auditor, 99 O. S., 285 ..... 16
Barbier v. Connolly, 113 U. S., 27 ..... 25
Bloomfield v. State, 86 O. S., 253 ..... 14
Booth v. Illinois, 184 U. S., 425 ..... 27
Buchanan v. Warley, 245 U. S., 60 ..... 18
C. B. & Q. R. R. v. Ill., 200 U. S., 561 ..... 23
Civil Right Cases, 109 U. S., 3 ..... 26
City of Tarkio v. Cook, 120 Mo., 1 ..... 29
City of Clearwater v. Bowman, 72 Kas., 92 ..... 29
City of Corinth v. Crittenden, 94 Miss., 41 ..... 29
Cole v. Village of Culbertson, 86 Neb., 160 ..... 29
Commonwealth v. Titcomb, 229 Mass., 14 ..... 18
Connolly v. Union Sewer Pipe Co., 184 U. S., 540 ..... 23, 27
Cotting v. Goddard, 183 U. S., 79 ..... 26
Dent v. W. Va., 129 U. S., 114 ..... 26
Dobbins v. Los Angeles, 195 U. S., 223 ..... 23
Duncan v. Mo., 152 U. S., 377 ..... 26
Ex Parte Meyers, 7 Cal. App. 528 ..... 20, 21
Ex Parte Murphy, 8 Cal. App. 440 ..... 20

| | Page |
|---|---|
| Fraser v. McConway, 82 Fed. Rep., 257 | 26 |
| Gulf, Colo. & Sante Fe Ry. v. Ellis, 165 U. S., 150 | 23-25 |
| Heim v. McCall, 239 U. S., 175 | 15 |
| Hudson River Elect. Power Co., In Re, 173 Fed., 934 | 11 |
| In re Yot Sang, 75 Fed. Rep., 983 | 26 |
| In re Parrott, 1 Fed. Rep., 481 | 18, 26 |
| In re Hudson River Electric Power Co., 173 Fed., 934 | 11 |
| Jackson v. Town of Union, 82 Conn., 266 | 12 |
| Lawton v. Steele, 152 U. S., 133 | 23 |
| Lockner v. N. Y., 198 U. S., 45 | 23 |
| May v. Sloan, 101 U. S., 231 | 12 |
| Meyers, Ex parte, 7 Cal. App., 528 | 20-21 |
| Minn. v. Barber, 136 U. S., 313 | 28 |
| Mugler v. Kas., 123 U. S., 623 | 23, 27 |
| Murphy, Ex parte, 8 Cal. App., 440 | 20 |
| Murphy v. Calif., 225 U. S., 623 | 20, 29 |
| Nashville Ry. v. Taylor, 86 Fed. Rep., 168 | 26 |
| Parrott, In re, 1 Fed. Rep., 481 | 18, 26 |
| Pembina Mining Co. v. Pa., 125 U. S., 181 | 26 |
| Schmidinger v. Chicago, 226 U. S., 578 | 13 |
| Schooner Nympth, 1 Summ (U. S.) 517 | 6 |
| Smith v. Cooley, 65 Cal., 46 | 7 |
| Soon Hing v. Crowley, 113 U. S., 703 | 25 |
| State ex rel Denny v. Bridges, 19 Wash., 44 | 7 |
| State v. Hall, 32 N. J. L., 158 | 21 |
| State v. Montgomery, 94 Maine, 192 | 17 |
| State v. McMonies, 75 Neb., 443 | 21 |
| State v. North, 160 N. C., 1010 | 7 |
| State v. Phipps, 50 Kan., 609 | 7 |
| State v. Tagami, 195 Cal., 522 | 8 |
| Templar v. Board, 131 Mich., 258 | 14, 17 |
| Trageser v. Gray, 73 Md., 250 | 14 |
| Truax v. Corrigan, 257 U. S., 312 | 24 |
| Truax v. Raich, 239 U. S., 33 | 17 |
| Yates v. Milwaukee, 10 Wall, 497 | 21 |
| Yick Wo v. Hopkins, 118 U. S., 356 | 16, 23, 26 |
| Yot Sang, In re, 75 Fed. Rep., 983 | 26 |

# Supreme Court of the United States

October Term, 1926.

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*THE STATE OF OHIO, EX REL JAMES CLARKE,*
*Plaintiff in Error,*

No. 272 *vs.*

*ALFRED F. DECKEBACH, as Auditor of the CITY OF CINCINNATI,*
*Defendant in Error.*

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**In Error to the Supreme Court of the State of Ohio.**

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## Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error residing in Cincinnati, Ohio, *is a subject of the King of England.* During the World War, in the year 1918, the City Council of Cincnnati, passed an ordinance providing for the licensing of billiard tables, and amended the former ordinance on the same subject by adding to the old ordinance the words, *"provided however, that no license shall be granted to a person who is not a citizen of the United*

States."

The chapter entitled "Licenses" of the Code of Ordinances, of which the billiard table ordinance is one section, makes it unlawful for any person to engage in any business therein enumerated including the business of operating billiard tables unless he shall first secure a license therefor. Violations of the ordinance are by said Chapter punishable by fine or imprisonment.

The plaintiff in error made a regular application for a license *and was refused on the sole ground of being an alien,* whereupon this suit in mandamus, an original action in the Supreme Court of Ohio, was brought against the Auditor of the City, the proper authority, to compel him to issue such a license. The ordinance was attacked on the ground that it violated the treaty between the United States and Great Britain, and also denied the equal protection of the laws guaranteed by the Fourteenth Federal Amendment. Plaintiff in error declared his willingness to comply with any valid ordinance relating to the business of operating billiard tables.

The Ohio Supreme Court issued its alternative writ of mandamus, and the respondent filed an answer admitting all the facts alleged in the petition. The relator then filed a Motion for Judgment on the Pleadings, which motion was resolved in favor of the respondent and final judgment was rendered thereon against the relator, and the ordinance was held valid. The case is here on writ of error under Section 237 of the Judicial Code.

## Propositions Discussed.

Point 1. The provision of the Billiard Table License Ordinance of the City of Cincinnati "that no license shall be granted to a person who is not a citizen of the United States," is in violation of and contrary to the Treaty between the United States and Great Britain, of which latter country the Plaintiff in Error is a subject.

Point 2. That said Ordinance is void and in contravention of Section One of the Fourteenth Amendment to the Constitution of the United States, in that it denies to the Plaintiff in Error and to all other aliens the equal protection of the law.

Point 3. That said Ordinance discriminates against all aliens in favor of naturalized and native born citizens, and denies plaintiff in error a license simply because he is an alien.

## The Ordinance Involved.

An Ordinance, No. 76-1918, "Providing for the Licensing of Billiard and Pool Tables by Amending Original Section 777 of the Code of Ordinances of the City of Cincinnati."

Be it ordained by the Council of the City of Cincinnati, State of Ohio:

Section 1. That original Section 777 of the Code of Ordinances of the City of Cincinnati be and the same is hereby amended to read as follows:

Section 777. Billiard Table, etc.—Each proprietor of a billiard or pool table shall pay a license of twenty-five ($25.00) dollars per annum for one such table and fifteen ($15.00) dollars per annum for each additional

table; *provided however that no license shall be granted to a person who is not a citizen of the United States.*

Section 2. That said original Section 777 of the Code of Ordinances be and the same is hereby repealed.

Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed February 26, A. D. 1918.

## BRIEF OF ARGUMENT.

### *Point One.*

THE PROVISION OF THE BILLIARD TABLE LICENSE ORDINANCE OF THE CITY OF CINCINNATI "THAT NO LICENSE SHALL BE GRANTED TO A PERSON WHO IS NOT A CITIZEN OF THE UNITED STATES," IS IN VIOLATION OF AND CONTRARY TO THE TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN, OF WHICH LATTER COUNTRY THE PLAINTIFF IN ERROR IS A SUBJECT.

In May, 1924, the U. S. Supreme Court unanimously held to be invalid an Ordinance of the City of Seattle (effective July, 1921), for "Licensing and regulating the business of pawnbroker," which ordinance provided, "that no license shall be issued unless the applicant be a citizen of the United States," thus reversing the Supreme Court of the State of Washington. *Asakura* v. *City of Seattle*, 265 U. S., 332.

The Seattle Ordinance (enacted in 1921) was patterned after the Ordinance of Cincinnati which was enacted in 1918.

| Seattle (1921) | Cincinnati (1918) |
| --- | --- |
| "That no license (as a pawnbroker) shall be issued unless the applicant be a citizen of the United States." | "No license (to operate billiard tables) shall be granted to a person who is not a citizen of the United States." |

(a) The Treaty's Protection Determined.

In the instant case, in considering the provisions of the treaty invoked by the plaintiff, the Supreme Court of Ohio, in its opinion at page 18 of the Transcript said, "*The treaty* (of the United States with Great Britain) *does protect merchants and traders, and if Clarke is a trader he is entitled to protection as such.*"

That finding is correct but the said court fell into error in thereafter holding that the business of Clarke is not a trade protected by and within the meaning of the treaty.

(b) Definition of the Word "Trade."

The city of Cincinnati has itself chosen to define and classify the operation of billiard tables as a "*Business, Trade, or Profession,*" and having done so, it is estopped to deny its existence as a lawful business.

The Billiard Table License Ordinance is Numbered 777, *and it is a part of Chapter 8* of the Code of Ordinances, from which Chapter it cannot be considered apart. Said Ordinance No. 777 is an *Ordinance to License,* and the title reads, "An Ordinance No. 76-1918, Providing for the licensing of billiard and pool tables, by amending original Section 777 of the Code of Ordinances of the city of Cincinnati."

Chapter 8 of the Code of Ordinances is entitled "*Licenses*" and is quite long and levies a license on very many lines of business and the chapter consists of 49 sections numbered 763 to 812 (including of course No. 777). The first section of Chapter 8 (being Section 763) is as follows: "No person shall be engaged in any *Trade, Business or Profession* hereinafter men-

tioned unless he or she shall have obtained a license therefor, as hereinafter provided."

Thus it will be seen, that *by its own definition* in said Section 763 of Chapter 8, *the city has made the operation of billiard rooms a "trade, business or profession."*

*In the absence* of a definition the Ohio Supreme Court might have felt it incumbent upon itself to define the term "trade," but it is unnecessary in the present case because the definition has been written and settled by the lawmaking body, to-wit, the city council, which has gone on record as considering the conduct of a billiard room as a lawful *"trade, business or profession."*

In holding that the operation of billiard tables was not a trade the Ohio Supreme Court said (page 18, Transcript of Record) "The word 'trade' has a well-settled meaning in commerce, which has been adopted by courts generally as the business of the purchase and sale of goods, wares and merchandise," *but none of the authorities cited by said court are in point* as we show later in this brief.

It is evident that the Ohio Supreme Court has entirely overlooked the fact, that the business of operating billiard tables is classed as a *"trade, business or profession"* by the city of Cincinnati.

We cite the following authorities giving the broader meaning of the term "trade."

In Schooner Nymph, 1 Summ. (U. S.) 517, in interpreting the word trade as used in a statute declaring that if any licensed vessel or ship "shall be employed in any other trade than that for which she is licensed," she shall be forfeited, Storey, J., said:

> "The word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupation, employment or business is carried on for the purpose of profit or gain or a livelihood, not in the liberal art or in the learned professions, it is constantly called a trade."

In that case codfishing was held to be a trade.

In the case of *State* v. *North,* 160 N. C., 1010, the court had under consideration the case of a statute authorizing taxation of trades, professions, franchises and incomes, and during the course of an opinion said trade comprehends,

> "Not only all who are engaged in buying and selling merchandise, but all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment, or business embarked in for gain or for profit."

In *State* v. *Phipps,* 50 Kan., 609, the court, speaking of "trade" said:

> "In the broader sense it is any occupation or business carried on for subsistance or profit."

In *Smith* v. *Cooley,* 65 Cal., 46, the court said:

> "The working of a mine under a bare 'mining right' has been uniformly considered by courts of equity as a species of trade."

In the case of *State, ex rel. Denny,* v. *Bridges,* 19 Wash., 44, the court said:

> "As asserted by counsel for plaintiff, the word 'Commercial' is one of wide signification, and in its general sense may mean almost any transaction or intercourse, between men."

In the recent case of *State* v. *Tagami*, 195 Cal., 522, the court held that *a lease of land* to a Japanese alien for the sole purpose of using and occupying the same as a *health resort and sanitarium*, is for such a 'commercial' purpose as comes fairly within the intendment of the existing treaty between the United States and Japan.

It is worthy of note, that the California court in its opinion refers to and follows the recent decision of this court in the case of *Asakura* v. *Seattle*, 265 U. S., 332.

(c) The Asakura Case.

In the *Asakura case* the Washington Supreme Court was found in error in its holding that pawnbroking was a privilege, which might be absolutely denied to any one, and that no one had an inherent right to pursue it, and that under the police power of the state *a Japaneese alien* might be denied a license to operate a pawn shop.

(d) An Unlawful Exercise of the Police Power.

*In the instant case*, the Ohio Supreme Court has fallen *into the same error* as the Washington Supreme Court did in the *Asakura case*.

In that case the court's reasoning was based upon the proposition that under the *police power* of the state *any regulation* of the business of pawnbroker was valid, even to denying the right of an alien to engage in it, nothing in treaties or the Federal Constitution to the contrary notwithstanding.

And the Washington Supreme Court in that case indicted the pawnbroking business in the following language:

"Pawnbroking has not so often come before the courts for consideration, but we find that decisions conform to what is the general understanding of men in holding that pawnbroking is a business which is surrounded with some degree of menace to the public good. In certain of its aspects, pawnbroking may be harmless, but, on the other hand, it is common knowledge that both on account of the nature of the business itself and somewhat on account of the character of those who engage in it, it offers a ready shelter for thievery, and to that extent encourages criminality. This aspect of the business has been recognized by both our state and city governments for statutes and ordinances will be found which attempt to strictly regulate the manner in which pawnbroking may be conducted, and providing, among other things, for a constant and careful police inspection and control. So that where the question as to the character of pawnbroking has arisen we find the courts deciding that to be allowed to engage therein is a privilege and not an inherent right."

However, in considering this opinion, the U. S. Supreme Court said in reversing the state court, 265 U. S., 332, at page 343:

"We have found no state legislation abolishing or forbidding the business. Most, if not all, of the states provide for licensing pawnbrokers and authorize regulation by municipalities. While regulation has been found necessary in the public interest, the business is not on that account to be excluded from the trade and commerce referred to in the treaty. Many worthy occupations and lines of legitimate business are regulated by state and federal

laws for the protection of the public against fraudulent and dishonest practices. There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the above quoted provision, and it must be held that such business is 'trade' within the meaning of the treaty. The ordinance violates the treaty."

In the instant case the Ohio Supreme Court said. (Page 19 Record):

"This record raises no issue concerning the personal character of the relator. We are not called upon to determine whether the relator has personal qualities which deny him the right to operate a pool table in the city of Cincinnati, but, on the contrary, we are only called upon to determine whether the class in which he belongs may properly be excluded from such occupation. The answer contains allegations about the character of pool rooms and of the lack of knowledge on the part of aliens concerning our laws and institutions. It is not our purpose to consider these allegations as reflecting upon the character of this relator, but we cannot ignore those allegations in determining the validity of the municipal legislation. Whether or not those allegations correctly state the character of pool rooms and the state of mind of subjects of foreign countries, the motion for judgment upon the pleadings assumes the truth of all those allegations. This legislation is enacted in the exercise of the police power, and its validity is therefore a political question, except that this court may consider as a justiciable question whether it is a reasonable exercise of such power. Under the well-settled rules which have heretofore been declared by this

> court, we may not declare that legislation invalid unless it has no reasonable relation to the public morals, public health, public order, and the peace and tranquility of the municipality. In view of the allegations of the answer, admitted as they are by the motion for judgment upon the pleadings, we are unable to find the legislation unreasonable."

(e) Not One of the Authorities Cited by the Ohio Supreme Court is in Point.

We understand that a "precedent" is an adjudged case considered as furnishing a rule for the determination of an identical or similar case afterwards arising, or of a similar question of law.

The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts. The question is, what is the underlying principle which caused a case to be decided as it was decided.

This being so, we now respectfully show in the order of their citation, *that none of the cases* referred to by the Ohio Supreme Court *are authorities in the instant case.*

> In re Hudson River Electric Power Co., (D. C.), 173 Fed., 934, 947. (Cited in opinion at page 18 of Printed Record.)

*This was a bankruptcy case,* involving the following subjects: Corporations subject to Act; Nature of Corporate Business; Act of Bankruptcy; Receivership; Public Service Corporation; Petitioning Creditors; Involuntary Proceedings; Right of Receiver to Contest.

The Ohio Supreme Court refers to page 947 of this Bankruptcy case for a definition of the word "trade," but no definition is there or anywhere in the case applicable in any way to the case at bar. In this bankruptcy case at page 947 the court says, "The question presented is: Was this company engaged principally in trading or mercantile pursuits within the meaning of the bankruptcy law?"

Clearly this citation is not in point.

*Jackson* v. *Town of Union*, 82 Conn., 266. (Page 18 Record).

The plaintiffs were engaged in *purchasing standing timber* and sawing lumber therefrom and objected to paying a tax levied on their businesss.

The court said at page 269, "The words of the statute, any trading * * * or mercantile business," are sufficiently comprehensive to include such a business as that described in the complaint. To "trade" is to engage in the purchase or sale of goods, wares and merchandise."

We say that this language of the court was not all embracing and did not intend to be. It was used only for the construction of the specific taxation statute upon the facts then before it.

The language of the court in any case must be considered with reference to the subject matter before the court.

Therefore we say that this taxation case is not in point for a definition in the instant case.

*May* v. *Sloan*, 101 U. S., 231. (Page 18 Record).

This was a bill in equity filed in the Circuit Court

for the 2nd Judicial Circuit of Florida, *to compel a conveyance of a tract of land in Florida.*

The court said at page 237, "The question must stand then, on the construction to be given to the written agreement of January 5, 1874, in view of the surrounding circumstances and the acts of the parties. Does the last clause of that agreement by its terms embrace the transaction contained in the contract made by Alvin May and Sloan on the 13th of December 1873? Was that transaction a 'trade' made by Alvin May relating to the mortgaged property, within the meaning of the terms? Was it a 'trade' carried out in good faith and completed?"

On page 239 the court held, "In the light of all these circumstances, it is hard to resist the conclusion that the word 'trade' in the agreement of January 5, 1874, was used by the parties in its broadcast signification, so as to include any bargain or sale. As such a meaning of the term is admissible, we think that the circumstances and acts of the parties show that it must have been intended. This being conceded, it plainly became the duty of Asa May after having purchased the property, to convey the land in question to the appellee."

So we maintain that this real estate case definition of the word "trade" can have no bearing upon the instant case.

*Schmidinger* v. *Chicago*, 226 U. S., 578. (Page 19 Record).

This case involves an ordinance *regulating the sale of bread* in the loaf within the city of Chicago.

The plaintiff claimed that the due process clause of the 14th Amendment was violated, in that the ordi-

nance was an unreasonable and arbitrary exercise of the police power.

The Ohio Supreme Court in citing this case says, "That case is not strictly in point in deciding the instant case, because the city of Cincinnati in its regulation of the business of operating a pool room has withheld rights from aliens which are granted to citizens."

We do not know why this case should have been cited at all, when the court itself says it is not strictly in point.

*Bloomfield* v. *State*, 86 O. S., 253. (Page 19 Record).

This is a case holding that a *license to traffic in intoxicating liquor* might be withheld from aliens though it would be granted to citizens.

We answer this citation in the words of the court in *Trageser* v. *Gray*, 73 Md., 250, in which case the question presented was whether aliens could be excluded from selling liquor. "This (the liquor business) is a business peculiar to itself, which might be wholly prohibited by the legislature."

We also answer in the words of the court in *Templar* v. *Board*, 131 Mich., 258, "So, too, a different question is presented that was before the court in *Trageser* v. *Gray*, 73 Md., 250, a case much relied upon by the Attorney General. In that case the question presented was whether aliens could be excluded from engaging in the business of retailing liquors. This is a business peculiar to itself, which might be wholly prohibited by the legislature, and licenses might be confined to a limited number. We need not, therefore, inquire whether such legislation is an infraction of the rights of the individual not a citizen."

We claim that this old liquor case cited by the Ohio Supreme Court is also not in point.

*Heim* v. *McCall*, 239 U. S., 175. (Page 20 Record).

This case decides that the *labor law of New York*, prohibiting the employment of aliens on public works, and its threatened enforcement, do not violate the 14th Amendment or the rights thereunder, nor under the provisions of the treaty with Italy.

The court quotes with approval at page 192, "It belongs to the state as the guardian of its people and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities."

We say that there is nothing pertaining to the construction of public works in the operation of a privately owned billiard room in Cincinnati, which would make this last and final case cited by the Ohio Supreme Court any authority in the instant case.

*We respectfully submit, that not one of the cases cited by the Ohio Supreme Court is in point.*

## Point 2.

That Said License Ordinance is Void and in Contravention of Section One of the Fourteenth Amendment to the Constitution of the United States, in That it Denies to the Plaintiff in Error and all Other Aliens the Equal Protection of the Law.

In the *Asakura case* before referred to, this court did not pass upon the contention of Asakura that the Seattle Ordinance was repugnant to the Fourteenth Amendment, but simply stated at the close of the opinion. "We need not consider other grounds upon which the ordinance is attacked."

In the instant case the Ohio Supreme Court said (Page 16 of Record) "This ordinance was challenged in a former proceeding in this court, entitled *State ex rel. Balli* v. *Carrell, Auditor,* 99 Ohio St., 285, in which this court held that it was not in conflict with any provision of the state or federal Constitution."

We desire to call attention to the fact, that unfortunately in the *Balli case,* error was never prosecuted to this court and therefore this court never had the matter for consideration. We strongly contend that the decision of the Ohio Supreme Court in the *Balli case* was erroneous, and we are glad that this court now has the opportunity to finally determine the matter.

(f) Protection Not Confined to Citizens Only.

Upon the allegations of the petition in the instant case, it must be assumed that the plaintiff in error has been admitted to the United States under Federal Law, with the privilege of abiding in the United States and hence of residing in any State of the Union. Being lawfully an inhabitant of Ohio, and a resident of Cincinnati, the petitioner is entitled under the 14th Amendment to the equal protection of its laws.

In the well known case of *Yick Wo* v. *Hopkins,* 118 U. S., 356, 359, this Court said:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens."

In the case of *Truax* v. *Raich*, 239 U. S., 33, 39, this Court said:

> "Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws. The description 'any person within its jurisdiction' as it has frequently been held, includes aliens." "These provisions," said the court in *Yick Wo* v. *Hopkins*, 118 U. S., 356, 369, (referring to the due process and equal protection clauses of the Amendment) "are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge to the protection of equal laws."

(g) Discrimination Against Aliens Prohibited.

In *State* v. *Montgomery*, 94 Maine, 192, the court held unconstitutional an act requiring all peddlers to secure a license, *and denying a license to an alien*, and in so doing said:

> "Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noted that the discrimination is not against a class, as criminals, as paupers, as intemperates and disqualified by character or habits, or as harmful to society, but as against a class solely as aliens. Such a discrimination is forbidden."

In *Templar* v. *Board*, 131 Mich., 254, 258, the court held unconstitutional an act which under the police power required barbers to take out a license, after passing an examination, *but which denied a license to aliens*, the plaintiff being a Canadian. In its opinion the court said:

"But had it (the Board) the right to require citizenship? If it had the right to couple that with *other* requirements, it would have the right to make that the *only* requirement."

* * * *

In the case of *American Sugar Refining Co.* v. *Louisiana*, 179 U. S., 89, 92, this Court said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, *RACE, NATIVITY*, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as tax payers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes."

In the case of *Commonwealth* v. *Titcomb*, 229 Mass., 14, the court said:

"It (the legislature) cannot proscribe one class upon the basis of race."

In the case of *In re Parrott*, 1 Fed. Rep., 481, the court held that discriminating legislation by a state against any class of persons, or against any persons of a particular race or nation, *in whatever form it may be expressed*, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws, and is prohibited by the 14th Amendment.

In the case of *Buchanan* v. *Warley*, 245 U. S., 60, this court held that a city ordinance forbidding colored

persons from occupying houses on blocks where a majority of the houses are occupied by whites, and which bases the interdiction upon color and nothing more, passes the legitimate bounds of police power and invades the civil right to acquire, enjoy, and use property, which is guaranteed in equal measure to all citizens, white or colored, by the Fourteenth Amendment.

We maintain that the Ordinance involved in this case cannot be justified as an exercise of the police power. Like any other law, police regulations are subject to the equal protection of the 14th Amendment.

In *Atchison, Topeka & Santa Fe Ry.* v. *Vosburg,* 238 U. S., 56, 59, this court said:

> "But we cannot at all agree that a police regulation is not, like any other law, subject to the 'equal protection' clause of the 14th Amendment. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation."

In *Allgeyer* v. *La.,* 165 U. S., 578, 589, this court said:

> "The liberty mentioned in the fourteenth amendment means not only the right of the citizen to be free from the mere physical restraint of his person, but * * * the right to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livlihood or vocation."

## Point 3.

### The Ordinance Discriminates Against all Aliens in Favor of Naturalized and Native-Born Citizens, And Denies Plaintiff in Error a License Simply Because he is an Alien.

#### (h) A Lawful Amusement.

In *Murphy* v. *Cal.*, 225 U. S., 623, 629, this court said:

> "*Playing at billiards is a lawful amusement,* and keeping a billiard hall is not, as held by the Supreme Court of California on plaintiff's application for habeas corpus, a nuisance *per se.*"

*Ex parte Meyers*, 7 Cal. App., 528, 530.

#### (i) A Lawful Business.

The business of operating billiard tables for hire is now and *always has been a lawful one under the laws of Ohio* and the ordinances of Cincinnati, and the city council cannot prohibit any honest man from engaging in it.

On the other hand, if the business is unlawful, the city cannot license it and the issuance of a license does not make a wrong business right.

It is a lawful business, which may be considered essential by its patrons and non-essential by other persons.

#### (j) Not a Nuisance Per Se.

A billiard room is not a nuisance *per se;* it is not necessarily harmful to the public welfare.

In *Ex parte Murphy*, 8 Cal. App., 440, 444 the court said:

> "We may concede at the outset that the business of conducting a public billiard room *is not per se a nuisance.*"

In *ex parte Meyers*, 7 Cal. App., 528, 530, the court said:

> "Freed from these influences (namely the professional billiard gambler) there can be no greater objection to them than to any other place of amusement. Indeed, it is quite probable that they often supply a resort and occupation for those who otherwise would visit places about whose immorality no question exists."

In *State* v. *McMonies*, 75 Neb., 443, 445, the court said:

> "The plaintiff's pool hall not being a nuisance *per se*, and the village authorities having no right to suppress it, as such, until by its management and conduct it becomes a nuisance in fact, what are the powers of the village board in dealing with it and other like places?"

(k) Must Be a Nuisance In Fact.

If a thing is not in fact a nuisance *per se*, it cannot be made so by a mere declaration of the legislative will expressed in an ordinance.

*Hume* v. *Cemetery*, 142 Fed. Rep. 552, 565.
*Yates* v. *Milwaukee*, 10 Wall. 497, 505.

In *State* v. *Hall*, 32 N. J. L. 158, 159, the court said:

> "In a legal point of view, a house may be disorderly in two ways, viz.: First, from the end or purpose to which it is appropriated; and Second, from the mode in which it is kept."
>
> "The end or purpose for which the house is designed, will render the keeping of such house illegal, if it be such as, of necessity, contravenes the provisions of any public statute; or be such as must be injurious to the public morals, peace or health; or to the comfort of

society. Instances of this sort are brothels, or places kept as a rendezvous for thieves. But if the purpose of the house be not necessarily injurious to society, the keeping of such house is never criminal, unless it be made so by the manner in which it is conducted."

In *Adams* v. *Tanner*, 244 U. S., 590, 594, this court said:

> "Because abuses may, and probably do, grow up in connection with this business (employment agency) is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices, and as to every one of them, no doubht some can be found quite earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

(1) Police Power Is Subject To Constitutional Limitations.

The Police Power may be exercised to protect the public health, morals, safety and the general welfare, but it is at all times subject to the constitutional limitations that it may not arbitrarily take away the lawful rights of a citizen.

*Lawton* v. *Steele*, 152 U. S., 133, 137;
*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 558;
*Dobbins* v. *Los Angeles*, 195 U. S., 223, 228;
*Yick Wo* v. *Hopkins*, 118 U. S., 356;
*C. B. & Q. R. R.* v. *Ill.*, 200 U. S., 561, 592, 593.

(m) Its Exercise Is a Judicial Question.

Whether a particular regulation is a valid exercise of the police power is ultimately a judicial, not a legislative question.

*Mugler* v. *Kas.*, 123 U. S., 622, 661;
*Gulf Colo. & S. F. Ry.* v. *Ellis*, 165 U. S., 150, 154;
*Lockner* v. *N. Y.*, 198 U. S., 45, 60.

(n) The Ordinance Is Unreasonable.

The Ordinance we challenge is not one to regulate billiard tables. *Other* ordinances of Cincinnati regulate such tables, namely those which make it unlawful for *any* billiard room to remain open after midnight and which make it unlawful for *any* person to play after said hour.

The matter before this court is only the *Ordinance to License* which denies a license to each and every *alien* simply because he is an alien, and without any regard to his *fitness or character*.

The City is not at liberty to treat the ownership of a billiard room by an alien as in itself a peril requiring restraint, regardless of the good character of the alien who owns it, and the manner in which it is conducted.

The Ordinance stamps as incompetent and unworthy every alien who wishes *as a proprietor* to operate billiard tables. Nothing however is done about the many

cases in which the billiard rooms *are managed and conducted by aliens as agents,* for citizen owners who have licenses. We ask, how can this business be dangerous to society when *owned* by an alien when it is not objectionable when *managed* by an alien?

We maintain that an alien has no more ability to properly conduct a billiard room the day after he is granted his full citizenship papers than he had the day before his hearing in the Federal Court. Nevertheless, under this unreasonable Ordinance, in one case he can get a license and in the other he can not. *It is the same man in each instance,* and the grant of Citizenship cannot render him more competent.

If prohibiting aliens from engaging in the business would remove all objections to it, there might be a reasonable ground for the classification, but as matters now stand, *there is no such reasonable ground.*

(o) The Classification Sought to be Drawn Is Purely Arbitrary and Rests Upon No Reasonable Basis.

The Ordinance confers privileges upon some persons which it denies to others. It is not a legitimate exertion of the power of classification. It rests upon no reasonable basis and is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates. It is not based on natural grounds of reasonableness or public policy and does not tend to promote the public welfare.

In *Truax* v. *Corrigan,* 257 U. S., 312, 337, this court speaking through Mr. Chief Justice Taft said:

> "Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconscciously

> exercising it. It must therefor obtain in and determine legislation; *but it must regard real resemblances and real differences* between things and persons, and class them in accordance with their pertinence to the purpose in hand."

In *Gulf, Colo. & Santa Fe Ry.* v. *Ellis*, 165 U. S., 150, 165, this court said:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th amendment, and that in all cases it must appear not only that a classification has been made, *but also that it is one based upon some reasonable ground*, some difference which bears a just and proper relation to the attempted classification, *and is not a mere arbitrary selection.*"

In *Barbier* v. *Connolly*, 113 U. S., 27, 32, this court said:

> "Class legislation discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

In *Soon Hing* v. *Crowley*, 113 U. S., 703, 709, this court said:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions."

In the Civil Rights Cases, 109 U. S., 3, this court said:

> "The Fourteenth Amendment exends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."

In *Pembina Mining Co.* v. *Pa.*, 125 U. S., 181, 188, this court said:

> "The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person, or class or persons, from being singled out as a special subject for discriminating and hostile legislation."

In *Dent* v. *W. Va.*, 129 U. S., 114, 121, this court said:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition."

In *Duncan* v. *Mo.*, 152 U. S., 377, 382, this court said:

> "The due process and equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the power of government."

*Cotting* v. *Godard*, 183 U. S., 79, 112;
*In re Yot Sang*, 75 Fed. Rep. 983;
*Yick Wo* v. *Hopkins*, 118 U. S., 356;
*Nashville Ry.* v. *Taylor*, 86 Fed. Rep. 168;
*In re Parrott*, 1 Fed. Rep. 481;
*Fraser* v. *McConway*, 82 Fed. Rep. 257.

(p) The Ordinance Has No Real or Substantial Relation to the Protection of the Public Morals or the Public Welfare.

To hold otherwise would be to brand every alien as bad, incompetent and undesirable, and to approve every naturalized or native born citizen as good, competent and law abiding, who for the mere fact of citizenship is entitled to a license. Under the Ordinance no alien, *no matter how honest and law abiding,* can obtain a license, while any bad, undesirable native-born or naturalized applicant can obtain the favor.

In *Booth* v. *Ill.*, 194 U. S., 425, 429, this court said:

> "The courts cannot interfere, unless looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

In *Connolly* v. *Union,* 184 U. S., 540, 558, this court said:

> "The State has undoubtedly the power by appropriate legislation to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

In *Mugler* v. *Kas.*, 123 U. S., 623, 661, this court said:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends (namely, the protection of the public

morals, the public health or the public safety) is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

In *Minn.* v. *Barber,* 136 U. S., 313, 320, this court said:

"Upon the authority of these cases and others that could be cited, it is our duty to inquire in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

(q) Valid Ordinances Sometimes Totally Prohibit, But Always Apply To All Persons Alike.

Ordinances totally prohibiting the keeping of billiard tables have been sustained by the Courts in a number of instances, *but in each case* we have found that the ordinance applied *to all persons alike,* male or female, white or black, *citizen or alien.*

*City of Tarkio* v. *Cook*, 120 Mo., 1;
*City of Clearwater* v. *Bowman*, 72 Kas.,92;
*City of Corinth* v. *Crittenden*, 94 Miss., 41;
*Cole* v. *Village of Culbertson*, 86 Neb., 160;
*Murphy* v. *Calif.*, 225 U. S., 623.

In the instant case it must be noted that the City has sought large license fees from the business, and *has not sought to prohibit* the trade, business or calling of providing amusement by the operation of billiard tables.

If some ordinance of Cincinnati had prohibited all billiard tables in the city, making no exceptions to favor some group, such an ordinance could not be classed as discriminatory or class legislation. But this License Ordinance before us is discriminatory and is class legislation of the most flagrant type, and bears no real or substantial relation to the protection of the public morals or the public welfare. It is a clear, unmistakable infringement of rights guaranteed by the fundamental law.

Respectfully submitted,
GEORGE S. HAWKE,
*Attorney for Plaintiff in Error.*

Office Supreme Court, U. S.
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CLERK

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1926.**

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## No. 272

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THE STATE OF OHIO EX REL. JAMES CLAKE,
PLAINTIFF IN ERROR,

*vs.*

ALFRED F. DECKEBACH, AS AUDITOR OF THE CITY OF CINCINNATI, DEFENDANT IN ERROR.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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## REPLY BRIEF FOR PLAINTIFF IN ERROR.

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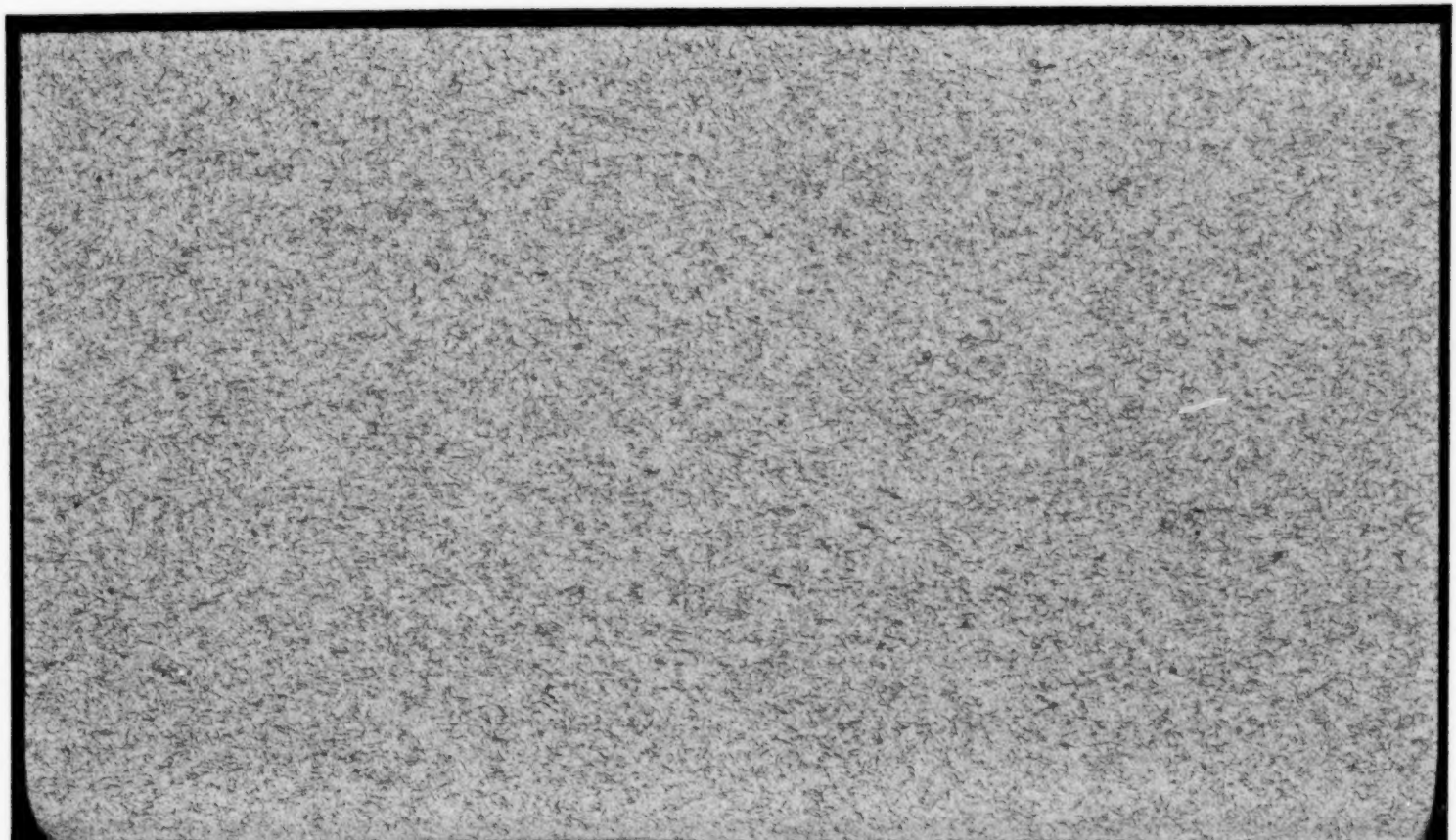
GEORGE S. HAWKE,
*Attorney for Plaintiff in Error.*



SUPREME COURT OF THE UNITED STATES

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THE STATE OF OHIO ex Rel. JAMES CLAKE,
Plaintiff in Error,

*vs.*

ALFRED F. DECKEBACH, as Auditor of the City of Cincinnati, Defendant in Error.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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## REPLY BRIEF FOR PLAINTIFF IN ERROR.

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For reply to the argument of defendant in error that the pleadings do not show that the plaintiff in error is a subject of the King of England, we call attention to the fact that the Ohio Supreme Court considered the legal effect of a motion for judgment on the pleadings and said (Record, page 19): "Whether

or not those allegations correctly state the character of pool rooms and the state of mind of subjects of foreign countries, the motion for judgment upon the pleadings assumes the truth of all those allegations. In view of the allegations of the answer, admitted as they are by the motion for judgment upon the pleadings," etc.

The defendant argued in that court that there was a denial in the answer that the relator is a British subject.

Nevertheless that court determined that the pleadings were sufficient to show the citizenship, considering the admissions in the answer (Record, page 11), "although respondent admits that he refused to receive said application and issue such license, by reason of the statement of the relator to this respondent that he was a subject of the King of England," coupled with the allegation of the petition that relator was a subject of the King of England.

In the case of Reinman *vs.* Little Rock, 237 U. S., 171, this Court said in a case exactly in point, at page 178, "this Court is not so closely restricted as before to the face of the record to ascertain what was decided in the State Court, and may examine the opinion, when properly authenticated, so far as may be useful in determining that question," *i. e.*, to ascertain what was decided.

We further say that the rules of this Court provide that the opinion of the Court below must be printed for the use of this Court, and the opinion in this case

clearly shows that the Court below considered that this plaintiff in error was, beyond question, a subject of the King of England.

## AS TO THE POWER OF THE POLICE TO PROHIBIT ENTIRELY.

In some few jurisdictions the business may be prohibited, but there is no such instance in the city of Cincinnati or the State of Ohio. It is a lawful business in Ohio, and Section 3670 of the General Code provides as follows in the chapter entitled "Municipal Corporations—Enumeration of Powers," Subtitle "Licenses":

> "SEC. 3670. Licenses—Manicuring, etc.—To regulate and license manufacturers and dealers in explosives, pawnbrokers, chattel mortgage and salary loan brokers, peddlers, public ball-rooms, scavengers, intelligence offices, BILLIARD ROOMS, bowling alleys, livery, sale and boarding stables, dancing or riding academies or schools, race courses, ball grounds, street musicians, second-hand dealers, junk shops, and all persons engaged in the trade, business or profession of manicuring, massaging or chiropody. In the granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient."

## CLASSIFICATION.

In the summary of the Supplemental Brief of Defendant in Error he says (page 30): "In conclusion,

we submit that the fundamental question in this case is whether the classification created by the ordinance is a valid one."

We desire to point out that the defendant in error has only commented upon nine out of the fifty-seven authorities cited by plaintiff in error.

Every opinion, of course, is to be read having regard to the facts of the case and the question actually decided. Simply taking a paragraph from any case and quoting the paragraph, without showing the facts of the case upon which the language of the court is based and the question involved, cannot be of benefit.

As an instance, the defendant in error cites the following cases as authority that a classification on the basis of citizenship has been recognized as within the equal-protection clause and as a reasonable basis for distinction in the instant case:

Cockrill *vs.* California, 268 U. S., 258.
Frick *vs.* Webb, 263 U. S., 326.
Porterfield *vs.* Webb, 263 U. S., 225.
Terrace *vs.* Thompson, 263 U. S., 197.
Webb *vs.* O'Brien, 263 U. S., 313.

These cases all involve the same question, namely, the right of an alien to own or lease land.

This Court has consistently recognized the power of the States with respect to the ownership of lands by aliens, and that, *in the absence of a treaty to the contrary,* a State has power to deny aliens the right to own land within its borders.

This denial is easily understood when we remember that at common law aliens were incapable of owning land.

But this disability of aliens at common law in respect to the ownership of real estate does not extend to personal property or to the rights contended for by this plaintiff in error under the Fourteenth Amendment, and for this reason we submit that these authorities are not of aid in the present case.

## LIQUOR CASES.

Another line of cases much relied upon by the defendant in error is that in which aliens were denied the right to engage in the saloon or liquor business, and he cites the following:

Trageser *vs.* Gray, 9 L. R. A., 780.
Bloomfield *vs.* Ohio, 86 O. S., 253.
Ohio *ex rel.* Lloyd *vs.* Dollison, 194 U. S., 445.

We pointed out in the Brief of Plaintiff in Error (page 14) these liquor cases were not applicable to the case at bar.

Justice Stephen J. Field, speaking for this Court, said that "the liquor traffic was the most prolific source of misery, insanity, vice and crime," and since that time the liquor business has been prohibited throughout the length and breadth of the land by the adoption of a Federal amendment to the Constitution.

We submit that nowhere have the charges against the traffic had more pronounced and unequivocal ex-

pression than in the formal findings of the courts of the United States. Beginning with this Court, and following down through the various Federal and State courts, there is an unbroken line of decisions which leaves the saloon no legal standing whatever. For instance, the courts have declared that A CITIZEN HAS NO INHERENT RIGHT to traffic in intoxicants; that no State can be compelled to license or permit it; that the liquor traffic is inimical to public health, morals and safety, and that it is the chief source of crime, vice and misery; and some courts have held that saloons are common nuisances and as such may be abated at any time.

In our opinion, the expressions and condemnations of this Court, followed as they were by the State courts, had most to do in molding public opinion, which finally resulted in the Eighteenth Amendment.

We urge that there is no analogy between the denial to aliens of the right to engage in the liquor business and the case at bar.

Anton *vs.* Van Winkle, 297 Fed., 340:

A case much relied upon by the defendant in error, as shown on page 20 of his Supplemental Brief, is that of Anton *vs.* Van Winkle, and part of the opinion of the district judge is printed.

It is worthy of note that this opinion is based upon the case of Balli vs. Carroll, 99 O. S., 285, the forerunner of the case at bar, and which Balli decision we now challenge in this action, inasmuch as the Ohio

Supreme Court has followed its former decision in the Balli case.

The Anton case involved the validity of a statute of Oregon, "No county, city, town or municipality shall issue a license to any PERSON NOT A CITIZEN OF THE UNITED STATES, to engage in the PAWNBROKER's business, or in the business of conducting a POOL OR BILLIARD HALL, card room or dance hall," and the United States district judge in Oregon held the ordinance valid, as we have said, upon the authority of the Balli case.

But since the decision in this Anton case, which, by the way, was decided on February 25, 1924, the very day the case of Asakura *vs.* Seattle was argued in this Court, the Supreme Court of the State of Oregon has authoritatively spoken in the case of George *vs.* City of Portland, 114 Oregon, 418, decided April 28, 1925, involving an ordinance prohibiting the issuance of a license to sell certain SOFT DRINKS to any person not a citizen of the United States, passed under authority of chapter 163 of the General Laws of Oregon.

The court considered the State statute which prohibited aliens from engaging in various businesses, and held that aliens are entitled in Oregon to the same treatment accorded to natural-born citizens, and declared invalid the statute which was in conflict with the Fourteenth Federal Amendment.

The decision of the Oregon Supreme Court in construction of its own State statute is superior to that of the United States district court in Oregon.

It is worthy of note that the Oregon Supreme Court expressly commented upon and refused to follow other

cases largely relied upon by defendant in error, namely:

Commonwealth *vs.* Hana, 195 Mass., 262 (peddler).
Trageser *vs.* Gray, 9 L. R. A., 780 (liquor).
Anton *vs.* Van Winkle, 263 U. S., 340 (billiards).

The same statute (chapter 163 of the General Laws of Oregon for 1923), which was declared unconstitutional on April 18, 1925, is the one upon which the United States district court passed in the Anton case, involving billiard tables, on February 25, 1924.

Patsone *vs.* Pennsylvania, 232 U. S., 138:

The defendant in error (pages 16 and 19) tries to show that the case of Patsone *vs.* Pennsylvania is important for our consideration. We answer, in the words of the court, "It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for its own citizens, if it pleases."

Murphy *vs.* California, 225 U. S., 623,

is cited by the defendant in error in support of his contention that under the police power the city has power to prohibit entirely the operation of pool rooms.

We do not understand it so. The facts before the court were entirely different from those of the case at bar. The Pasadena ordinance prohibited the keep-

ing of billiard rooms for hire, but permitted hotels of twenty-five or more rooms to operate a billiard room for the use of its guests. The question involved was not a classification between citizens and aliens, as in our case. Under the Pasadena ordinance any alien who owned a hotel of twenty-five rooms could keep a billiard room for the use of his guests, the same as if the proprietor were a citizen of the United States. And so the court held that the classification as to twenty-five-room hotels was a reasonable one.

Gizzarelli *vs.* Presbery, 44 R. I., 333:

The question involved was an ordinance of the city of Providence providing that a license to operate a motor bus should not be granted to an alien.

At page 335, "Authority to use the public highways as a common carrier of passengers for hire is not a right belonging to the individual, but is in the nature of a privilege" (17 R. I., 230; 91 N. J. L., 506). The ordinances in question were enactments made in the exercise of the police power delegated to the city council by the legislature (44 R. I., 207).

## IN CONCLUSION.

We maintain that the city of Cincinnati cannot decline to grant a license to plaintiff in error merely because he is an alien.

Aliens are within the equal-protection clause as fully as citizens, except in the following cases:

*a.* The right of the State to prohibit the ownership of lands within its border, there being no treaty to the contrary.

*b.* The right of the State to limit the right to take the common property of the State, such as fish, to citizens of the State.

*c.* The right of the State and of a municipality to employ none but citizens on public work.

*d.* The power to limit the right of franchise to citizens of the State.

Respectfully submitted,

GEORGE S. HAWKE,
*Attorney for Plaintiff in Error.*

Office Supreme Court
FILED
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No. 272.
October Term, 1926.

# Supreme Court of the United States

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THE STATE OF OHIO ex rel. JAMES CLAKE,
Defendant in Error,

vs.

ALFRED F. DECKEBACH as Auditor of The City of Cincinnati,
Defendant in Error.

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In Error to the Supreme Court of the State of Ohio.

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## BRIEF FOR DEFENDANT IN ERROR

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John D. Ellis,
City Solicitor.

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# INDEX


PAGE

The Facts ..... 1

Brief of Argument

I. Plaintiff in Error not entitled to mandamus on the facts as admitted in the pleadings ..... 3

II. The Treaty between the United States and Great Britain does not protect the operation of a pool room ..... 5

III. The operation of a pool room is not a "trade" nor "commerce" ..... 9

IV. The Cincinnati ordinance does not violate the Constitution of the United States ..... 10


## LIST OF AUTHORITIES CITED.


Jacobson v. Mass, 197 U. S. 11 ..... 4
Mugler v. Kansas, 123 U. S. 623 ..... 4
Minn. v. Barber, 136 U. S. 313 ..... 4
Atkin v. Kansas, 191 U. S. 207 ..... 4
Asakura v. Seattle, 265 U. S. 332 ..... 6
Bloomfield v. State, 86 O. S. 253 ..... 8
Adler v. Whitbeck, 44 O. S. 539 ..... 8
State v. Hipp, 38 O. S. 199 ..... 9
U. S. v. American Tobacco Co., 164 Fed. 700 ..... 9
In re: Hudson River Electric Co., 173 Fed. 934 ..... 9
Jackson v. Town of Union, 82 Conn. 266 ..... 9
State ex rel. Balli v. Carrel, 99 O. S. 285 ..... 10
Schmidinger v. Chicago, 226 U. S. 578 ..... 10
Bloomfield v. State, 86 O. S. 253 ..... 11
Heim v. McCall, 239 U. S. 175 ..... 12
Tragesser v. Gray, 9 L. R. A. 780 ..... 14

# Supreme Court of the United States

*THE STATE OF OHIO, EX REL. JAMES CLARKE,*
*Plaintiff in Error,*

No. 272. *vs.*

*ALFRED F. DECKEBACH, as Auditor of The City of Cincinnati,*
*Defendant in Error.*

## Brief for Defendants in Error

The pleadings in this cause consist of the petition for mandamus and the answer of the respondent, and the relator's motion for a judgment on the pleadings.

THE FACTS AS SHOWN BY THE PLEADINGS.

The petition alleges that the relator is a subject of the King of England and a resident of the City of Cincinnati; that the respondent is the duly elected, qualified and acting Auditor of the City of Cincinnati, and as such it is his duty to receive applications for and issue pool and billiard-table licenses in the City of Cincinnati; that on April 22, 1925, the relator applied to the respondent for a pool and billiard table license for the year 1925 for five pool and billiard tables at 1413 Central avenue in the City of Cincinnati, and that the respondent refused to receive such application and to issue a license thereunder by reason of the fact that

the relator is an alien, and that Ordinance No. 76-1918 of the Code of Ordinances of the City of Cincinnati, passed February 28, 1918, provided * * * "that no license shall be issued to a person who is not a citizen of the United States."

The relator alleges that said ordinance is in violation of and contrary to the treaties of commerce between the United States and Great Britain and invokes the protection of said treaties and especially "national treatment" and "most favored nation" clauses thereof; and further that the said ordinance is in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to him the equal protection of the law.

The answer of the respondent admits that he is the Auditor of the City of Cincinnati and that as such Auditor it is his duty to receive applications for and to issue pool and billiard table licenses in the City of Cincinnati as required by the ordinances of said city; that the relator applied to him on April 22, 1925, for a pool and billiard table license for said year, and that he refused to receive said application and to issue a license thereunder; that on February 26, 1918, as alleged in the petition, the council of the City of Cincinnati passed Ordinance No. 76-1918, which provided: * * * "that no license for a billiard or pool table shall be granted to a person who is not a citizen of the United States." That he has no personal knowledge that the relator was at the time he applied for such license a subject of the King of England, and therefore denies that he was such subject, although admitting that he refused to receive said application and issue such license by rea-

son of the statement of the relator to him that he was such subject.

The respondent in further answering alleged that pool and billiard rooms are and have been meeting places of idle and vicious people, and are and have been the means of contributing to juvenile delinquency; that numerous crimes and offenses against the state laws and city ordinances have been committed therein; that such places are frequented by law-breakers and an undesirable class of persons, thereby requiring the most strict surveillance of the police department of the City of Cincinnati, and that as a class persons who are not citizens of the United States are not as familiar with the laws and customs thereof as are native born or naturalized citizens, and that pool and billiard rooms maintained by persons not citizens of the United States are therefore a menace to society and the public welfare, and that the ordinance complained of by the relator is a reasonable police regulation, adopted in the interests and for the benefit of the general public, and that said ordinance is a reasonable one.

The answer of the respondent further contains a general denial of all matters in the petition not admitted in said answer to be true.

## I.

### Plaintiff in Error Not Entitled to Mandamus on the Facts as Admitted In the Pleadings.

The motion of the relator for a judgment on the pleadings admits the allegations in the answer of the respondent. Among these is a denial that the relator

is a subject of Great Britain, and those allegations concerning the character of persons who frequent pool and billiard halls; the crimes committed therein; the attention required thereof by the police department of the city, and that citizens o fthe United States, either native born or naturalized, are more familiar with the laws and customs of this country than are aliens, and that pool and billiard halls maintained by persons who are not citizens are a menace to the public welfare.

The causes therefore that led the city council to adopt this ordinance being admitted, there is further admitted the existence of certain evils that the city council sought to remedy, bringing the ordinance fairly and squarely within the holding of the supreme court of the United States, that there is no power to review such legislative action unless it has no real nor substantial relation to the subject-matter of the ordinance and the end sought by it, or is beyond all question a plain palpable abuse of rights secured by the fundamental law.

*Jacobson* v. *Mass.*, 197 U. S., 11.
*Mugler* v. *Kas.*, 123 U. S., 623.
*Minn.* v. *Barber*, 136 U. S., 313, 320.
*Atkin* v. *Kansas*, 191 U. S., 207, 223.

The supreme court of Ohio, therefore, had before it only the pleadings in this case which disclosed a denial of the essential fact that relator was a British subject and affirmative allegations fully sustaining the city council in its exercise of control over pool rooms. Since the motion for judgment on the pleadings admits the material allegations of the answer the Ohio court properly refused to grant a writ of mandamus.

## II.

### The Treaty Between the United States and Great Britain Does Not Protect the Operation of a Pool Room.

The ordinance in question is set forth in the brief of opposing counsel but for the convenience of the court is herein repeated.

> "*An Ordinance* No. 76-1918, Providing for the licensing of billiard and pool tables by amending original Section 777 of the Code of Ordinances of the city of Cincinnati.
>
> "*Be it ordained* by the Council of the city of Cincinnati, State of Ohio:
>
> "Section 1. That original Section 777 of the Code of Ordinances of the city of Cincinnati be and the same is hereby amended to read as follows:
>
> "Section 777. Billiard Table, etc.—Each proprietor of a billiard or pool table shall pay a license of twenty-five ($25.00) dollars per annum for one such table and fifteen ($15.00) dollars per annum for each additional table; provided however that no license shall be granted to a person who is not a citizen of the United States.
>
> "Section 2. That said original Section 777 of the Code of Ordinances be and the same is hereby repealed.
>
> "Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.
>
> "Passed February 26, A. D. 1918.
>
> "Carl M. Jacobs, Jr., *Vice-Mayor.*
>
> "Attest: Fred Schneller, *Clerk.*
>
> "Approved: John Galvin, *Mayor.*
>
> "Feb. 28, 1918."

This ordinance was passed under the general powers of municipalities as conferred by the General Code of Ohio, and the authority for the passage of the ordinance in question, is not denied, unless, as opposing counsel claims, the ordinance is invalid by reason of the decision of the supreme court of the United States in the case of *Asakura* v. *City of Seattle,* 265 U. S., 332, decided May 26, 1924.

This case has no bearing however on the case at bar, as the treaties between Japan and the United States, and Great Britain and the United States are distinctly different. The former treaty provides that "The citizens or subjects of each of the High Contracting Parties shall have the liberty to enter, travel and reside in the territory of the other, to carry on *trade,* wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice * * * and generally to do anything incident or necessary for trade upon the same terms as native citizens or subjects * * *." (Treaty and Protocol between United States and Japan, proclaimed April 5, 1911.)

It will be noted that this treaty gives the right to carry on "trade," and the Seattle ordinance under consideration by the supreme court defined a "pawnbroker" to "mean and include every person whose business or occupation is to take and receive by way of pledge, pawn or exchange goods, wares and merchandise of any kind or any personal property whatever for the repayment of security or any money loaned thereon, or to loan money on deposit of personal property," and defined a pawnshop to "mean and include every place in which the business of pawnbroker is carried on."

The supreme court therefore held that there was no

question but that the operation of a pawnshop as defined by the ordinance in question constituted carrying on a business or trade, and that, therefore, such business or trade was protected by the terms of the treaty in question.

The treaty between the United States and Great Britain is of an entirely different character and is in fact nothing more than is indicated by its title "A Convention—To regulate the *commerce* between the territories of the United States and his Brittannick majesty." (United States Statutes at Large, page 228, Foreign Treaties.) This treaty was adopted July 3, 1815, but has been continued in force by subsequent conventions in the same language, which probably accounts for the peculiarity of the spelling found therein.

The treaty contains the following clause:

> "Art. I. There shall be between the territories of the United States of America, and all the territories of his Britannick majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countires, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

It will be noticed that there is no reference in this

article to carrying on trade but that the treaty merely provides "protection and security for their commerce, *but "subject always to the laws and statutes of the two countries, respectively."*

It is apparent therefore that the High Contracting Parties to this convention having in contemplation a treaty referring only to commerce have taken ample steps for the protection of the purpose for which the treaty was adopted, and that, therefore, the Seattle case, which construed the terms of an entirely different treaty, can have no bearing upon the subject-matter under consideration in this case.

If this construction is too narrow, it will be further noted that the protection and security guaranteed by Article I quoted above, and the privileges granted thereunder are "subject always to the laws and statutes of the two countries, respectively." It was therefore clearly within the contemplation of the High Contracting Parties that whatever privileges were granted, respectively, to the citizens of either nation were subject at all times to the laws and statutes of both Great Britain and the United States.

Accordingly, under the terms of this treaty, no one can complain if a license or special privilege is conferred upon one person and denied to another.

> "A license is a permission to do something which would not be allowed without such license. *State* v. *Frame,* 39 O. S., 399, III Longsdorf's Notes, 1038; *Bloomfield* v. *State,* 86 O. S., 253.
>
> "A license creates a right that did not exist and could not exist without the license. *Adler* v. *Whitbeck,* 44 O. S., 539, IV Longsdorf's Notes, 231.

> "A license is permission granted by some competent authority to do an act, which without such permission would be illegal. *State* v. *Hipp*, 38 O. S., 199, III Longsdorf's Notes, 965."

## III.

### The Operation of a Pool Room Is Not a "Trade" Nor "Commerce."

Neither is the operation of a pool room the carrying on of a business or trade. The term "trade" has a well-settled meaning, and has been defined upon numerous occasions. "Trade" is the business of exchanging commodities by buying and selling for money. *United States* v. *American Tobacco Co.*, 164 Fed., 700, 708, "Trade" within the Bankruptcy Act (Act July 1, 1898, c. 541, Section 4b, 30 Stat., 547) is the buying and selling of merchandise or any class of goods, deriving a profit therefrom. *In re Hudson River Electric Power Co.*, 173 Fed., 934, 947.

To "trade" is to engage in the purchase or sale of goods, wares and merchandise. *Jackson* v. *Town of Union*, 73 Atl., 773, 774; 82 Conn., 266 (citing Century Dictionary).

> "The owning, controlling, and leasing of theaters, and the producing of plays and entertainments, and the booking of contracts for the production of plays, is not 'trade or commerce,' within the Penal Code, Section 168, subds. 5, 6, prohibiting a conspiracy to commit any act injurious to 'trade or commerce.' *People* v. *Klaw*, 106 N. Y. Supp., 341, 350, 55 Misc. Rep., 72 (citing Webst. Dict.; Stand. Dict.; 2 Bouv. Law Dict., 1127; Jac. Law Dict.; *United*

*States* v. *Cassidy,* 67 Fed., 698; *United States* v. *Coal Dealers' Assn.,* 85 Fed., 252; *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.), 1, 6 L. Ed., 23; *Henderson* v. *New York,* 92 U. S., 259, 23 L. Ed., 543; *Welton* v. *Missouri,* 91 U. S., 275, 23 L. Ed., 347; *Hannibal & St. J. R. Co.* v. *Husen,* 95 U. S., 465; 24 L. Ed., 527.)"

## IV.

### The Cincinnati Ordinance Does Not Violate the Constitution of the United States.

The exact question raised by the relator in this case has previously been passed upon by the supreme court of Ohio in *State, ex rel. Balli* v. *Carrel,* 99 O. S., 285, the syllabus of which is as follows:

> "A municipal ordinance purporting to regulate and license pool and billiard rooms, which contains a provision that 'no license shall be granted to a person who is not, by reason of such provision, a citizen of the United States,' is not in conflict with any provision of the state or federal constitution."

In discussing this case the court quotes with approval *Schmidinger* v. *City of Chicago,* 226 U. S., 578, where it was held:

> "The right of the legislature, or the municipality under legislative authority, to regulate one trade and not another is well settled as not denying equal protection of the laws. * * *
>
> "Local legislative authorities, and not the courts, are primarily the judges of the necessities of local situations calling for police reg-

ulation, and the courts can only interfere when such regulation arbitrarily exceeds a reasonable exercise of authority."

This court also refers to the Constitutional provision of the state of Ohio, which reads as follows:

> "License to traffic in intoxicating liquors shall not be granted to any person who at the time of making application therefor is not a citizen of the United States and of good moral character." Section 9, Article XV.

This same subject was also considered by the Ohio supreme court in *Bloomfield* v. *State*, 86 Ohio St., 253, in which the claim was made that a similar provision found in the General Code of Ohio (100 Ohio Laws, 89) was contrary to the Constitution of Ohio and that of the United States. At page 266 the court said:

> "We do not think the statutes of Ohio and of other states, which have barred aliens from the liquor traffic in the manner stated have arisen from a spirit of race hatred or inhospitality, or a purpose to deny the equal protection of our laws or equal opportunity under our institutions. But they are based on the belief, that an alien cannot be sufficiently acquainted with our institutions, and our life, to enable him to appreciate the relation of this particular business to our entire social fabric. When he has become more familiar with the spirit of the American people and their laws and has become a citizen, he will easily and readily (in the conduct of the business) assist in the furtherance of the policy of the state."

The same question has been decided by other jurisdictions. *Heim* v. *McCall*, 239 U. S., 175:

> "The provisions of Section 14 of the Labor law of 1909 of New York that only citizens of the United States shall be employed on public works, and that preference shall be given to citizens of that state, is not unconstitutional under the privilege and immunities clause of the Constitution of the United States or under the equal provision of due process clause of the Fourteenth Amendment thereto, or as violative of the Treaty of 1871 with Italy." (Syl.)

At page 193:

> "The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.
>
> "The citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.
>
> "There were slight modifications of these provisions in the treaty of 1913, as follows: 'That the citizens of each of the high contracting parties shall receive, in the States

and Territories of the other, the most constant security and protection for their persons and property and for their rights. * * *

"Construing the provision of 1871 the Court of Appeals decided that it 'does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys.' The conclusion is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligations of treaties when made. The present case is concerned with construction, not power; and we have precedents to guide construction. The treaty with Italy was considered in *Patsone* v. *Pennsylvania*, 232 U. S., 138, 145, and a convention with Switzerland (as in the present case) which was supposed to become a part of it. It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign-born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said 'that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the ruling was given point by a citation of the power of the state over its wild game which might be preserved for its own citizens. In other words, the ruling was given point by the special power of the state over the subject-matter, a power which exists in the case at bar, as we have seen.

"From these premises we conclude that the Labor Law of New York and its threatened enforcement do not violate the Fourteenth Amendment or the rights of plaintiffs in error

thereunder nor under the provisions of the treaty with Italy."

*Tragesser* v. *Gray*, 9 L. R. A. (1890), Maryland Court of Appeals, page 780:

> "The Legislature may prohibit or restrict the sale of spirituous liquors in any manner which its discretion may dictate. No one can claim as a right any power whatever to sell such liquors; if he sells at all it must be on such terms as the Legislature sees fit to impose." (Syl. 1.)
>
> "A state's denial to persons not citizens of the United States of the right to obtain licenses to sell spirituous liquors within its borders is not a discrimination against them, or an abridgment of their rights within the prohibition of the 14th Amendment of the Constitution of the United States." (Syl. 2.)

At page 783:

> "Under every system of government, there must be power in some of its departments to provide for the regulation of the internal affairs of the state. Public morals, public health, public order, peace and tranquility are objects of cardinal importance to the well-being of society. Without the power to protect and preserve these interests, civilized government could not exist. The limit and extent of this power are somewhat vague and undefined."

At page 784:

> "It was thought proper to confine the licenses to citizens of the United States of temperate habits and good moral character. The privilege is very liable to be abused, and abuses

would produce great public detriment. It therefore seemed wise to the Legislature to confer it only on those who being natives of the country, might reasonably be supposed to have a regard for its welfare; or who not being natives had, as required by Naturalization Law, proven by creditable testimony before a court of justice that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness. It was certainly the function of the law-making department to exercise its judgment on this question, and this court has no right to criticize its conclusion. We do not think that this law is, in any manner, in conflict with the Constitution of this state."

* * * * * * * * *

"It has been uniformly held in all courts that no clause in the Federal Constitution interferes with the power of the states to promote and protect the public health, peace, morals, and good order within their respective limits."

At page 786:

"It has been maintained that the appellant (*Tragesser*) has rights under existing treaties which have been infringed by the denial of licenses to aliens. Our opinion on this question has been sufficiently indicated, but a few more words may be added. If we assume, for the sake of argument, that Tragesser has under treaties every right which a citizen could have, the answer is that no citizen of the United States can complain because a police regulation denies him the privilege of selling liquor, even if the privilege is granted to other citizens. We are unable to conceive that any-

> one, citizen or alien, can acquire rights which could in any way control, impair, impede, limit or diminish the police power of a state. Such power is original, inherent and exclusive: it has never been surrendered to the general government, and never can be surrendered, without imperiling the existence of civil society."

Inasmuch, therefore, as the operation of a pool room is not a "trade" and is not the subject of the convention between the United States and Great Britain, it is respectfully submitted that the petition in error should be dismissed.

Respectfully submitted,

JOHN D. ELLIS,
*City Solicitor.*

# SUPPLEMENTAL

# BRIEF

Office Supreme Court, U. S.
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APR 4 1927
WM. R. STANSBURY
CLERK

No. 272.
October Term, 1926.

# Supreme Court of the United States

THE STATE OF OHIO, ex rel JAMES CLARK,
Plaintiff in Error,

vs.

ALFRED F. DECKEBACH,
as Auditor of the City of Cincinnati,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

## *SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR*

John D. Ellis,
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Attorney for Defendant in Error.

## INDEX.


| | PAGE |
|---|---|
| Statement of the Case | 1 |
| I. The Petition | 1 |
| II. The Answer | 2 |
| III. Motion for Judgment on the Pleadings | 4 |
| Argument— | |
| I. The Plaintiff in Error is not entitled to the protection of the British Treaty | 5 |
| a. The Plaintiff in Error is not a British Subject | 5 |
| b. The British Treaty does not protect the operation of a pool room | 6 |
| II. The ordinance does not deny to the Plaintiff in Error the equal protection of the law | 10 |
| a. The ordinance is a valid exercise of the police power of the city | 11 |
| b. Under the police power the city has the power to prohibit entirely the operation of pool rooms | 12 |
| c. The mere fact of classification of those to whom a law applies does not violate the equal protection clause of the XIV Amendment | 14 |
| d. The court will not disturb a law providing for classes of persons unless it can clearly hold that there is no reasonable basis for the classification | 15 |
| e. A classification on the basis of citizenship has been recognized as within the equal protection clause and as a reasonable basis for distinction | 17 |
| III. Plaintiff in Error's rights under the British Treaty and under the XIV Amendment are the same | 30 |
| Summary | 31 |

## LIST OF AUTHORITIES CITED.


| | Page |
|---|---|
| Asakura v. City of Seattle, 265 U. S. 332 | 9 |
| Anton v. Van Winkle, 297 Fed. 340 | 20, 26 |
| Balli v. Carrell, 99 O. S. 285 | 18 |
| Barrett v. Indiana, 229 U. S. 26 | 15, 16, 24, 25 |
| Bloomfield v. Ohio, 86 O. S. 253 | 26 |
| 1 Bates Pleading and Practice (Ohio) 426-427 | 5 |
| Billings v. Cleveland Ry. Co., 92 O. S. 478 | 11 |
| Booth v. Illinois, 184 U. S. 429 | 12 |
| Bouviers' Law Dictionary (ed. 1897) | 8 |
| 31 Cyc. 606 | 5 |
| Cockrill v. California, 268 U. S. 258 | 14, 19 |
| Crescent Cotton Oil Co. v. Miss., 257 U. S. 129 | 17 |
| Commonwealth v. Hana, 195 Mass. 262 | 23 |
| Dailey v. Chappell, 12 O. C. C. (N.S.), 561, 565 | 5 |
| Fitzgerald v. Cleveland, 88 O. S. 338 | 11 |
| Frick v. Webb, 263 U. S. 326 | 20 |
| Gizarrelli v. Presbery, 44 R. I. 333 | 21 |
| Jackson v. Town of Union, 82 Conn. 266 | 9 |
| Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224 | 17 |
| McCoy v. Jones, 61 O. S. 119 | 5 |
| May v. Sloan, 101 U. S. 231, 237 | 8 |
| Murphy v. California, 225 U. S. 623 | 10, 12, 25 |
| M. K. & T. Ry. Co. v. May, 194 U. S. 267 | 15, 24 |
| Middletown v. Texas Power & Light Co. 249 U. S. 152 | 17 |
| Miller v. City of Niagara, 207 Ap. Div. N. Y. 798 | 22 |
| Ohio General Code, Sec. 11601 | 5 |
| Ohio Constitution, Art. XVIII, Sec. 3 | 11 |
| Ohio ex rel Lloyd v. Dollison, 194 U. S. 445 | 24 |
| Patsone v. Pennsylvania, 232 U. S. 138 | 15, 16, 19 |
| Porterfield v. Webb, 263 U. S. 225 | 20 |
| Rheinheimer v. Ins. Co., 77 O. S. 360, 372 | 5 |
| Railroad Co. v. Nobil, 85 O. S. 175 | 5 |
| Rast v. Van Deman, 240 U. S. 342 | 17 |
| Singer Sewing Machine Co. v. Brickell, 233 U. S. 304 | 15, 24 |
| State v. Rheaume, 116 Atl. (N. H.), 758 | 22 |

| | Page |
|---|---|
| Truax v. Corrigan, 257 U. S. 312 | 14 |
| Terrace v. Thompson, 263 U. S. 197 | 15, 18 |
| Tragesser v. Gray, 9 L. R. A. 780 | 27 |
| 8 U. S. Stat. at Large, 228 | 7 |
| 37 U. S. Stat. at Large, 1504 | 9 |
| Walling v. Brown, 9 Idaho 184; 72 Pac. 960 | 6 |
| Webb v. O'Brien, 263 U. S. 313 | 20 |

# Supreme Court of the United States

*THE STATE OF OHIO, EX REL. JAMES CLARKE,*
*Plaintiff in Error,*

No. 272. *vs.*

*ALFRED F. DECKEBACH, as Auditor of The City of Cincinnati,*
*Defendant in Error.*

## Supplemental Brief for Defendant in Error.

### Statement of the Case.

This case comes before the court upon writ of error to the Supreme Court of the State of Ohio. Since we cannot agree with the statement of the case as made by plaintiff in error (Brief, pp. 1-2) it is necessary at the outset to state briefly the pleadings upon which the case was decided by the Ohio court.

The case was tried upon the petition in mandamus filed in the Ohio Supreme Court by plaintiff in error, the answer of defendant in error and the motion for judgment on the pleadings filed by plaintiff in error.

### I. The Petition.

The petition (Rec., pp. 6-8) alleges that the relator is a subject of the King of England and a resident of the city of Cincinnati; that the respondent is the duly

elected, qualified and acting Auditor of the city of Cincinnati, and as such it is his duty to receive applications for and issue pool and billiard table licenses in the city of Cincinnati; that on April 22, 1925, the relator applied to the respondent for a pool and billiard table license for the year 1925 for five pool and billiard tables at 1413 Central avenue in the city of Cincinnati, and that the respondent refused to receive such application and to issue a license thereunder by reason of the fact that the relator is an alien, and that Ordinance No. 76-1918 of the Code of Ordinances of the city of Cincinnati, passed February 26, 1918, provided * * * "that no license shall be issued to a person who is not a citizen of the United States."

The relator alleges that said ordinance is in violation of and contrary to the treaties of commerce between the United States and Great Britain and invokes the protection of said treaties and especially the "national treatment" and "most favored nation" clauses thereof; and further that the said ordinance is in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies to him the equal protection of the law.

## II. The Answer.

The answer of the respondent (Rec., pp. 10-12) admits that he is the auditor of the city of Cincinnati and that as such auditor it is his duty to receive applications for and to issue pool and billiard table licenses in the city of Cincinnati as required by the ordinances of said city; that the relator applied to him on April 22, 1925, for a pool and billiard table license for said year, and that he refused to receive said application and to issue

a license thereunder; that on February 26, 1918, as alleged in the petition, the council of the city of Cincinnati passed Ordinance No. 76-1918, which provided: * * * "That no license for a billiard or pool table shall be granted to a person who is not a citizen of the United States." That he has no personal knowledge that the relator was at the time he applied for such license a subject of the King of England, and therefore denies that he was such subject, although admitting that he refused to receive said application and issue such license by reason of the statement of the relator to him that he was such subject.

The respondent in further answering alleged that pool and billiard rooms are and have been meeting places of idle and vicious people, and are and have been the means of contributing to juvenile delinquency; that numerous crimes and offenses against the state laws and city ordinances have been committed therein; that such places are frequented by law-breakers and an undesirable class of persons, thereby requiring the most strict surveillance of the police department of the city of Cincinnati, and that as a class persons who are not citizens of the United States are not as familiar with the laws and customs thereof as are native born or naturalized citizens, and that pool and billiard rooms maintained by persons not citizens of the United States are therefore a menace to society and the public welfare, and that the ordinance complained of by the relator is a reasonable police regulation, adopted in the interests and for the benefit of the general public, and that said ordinance is a reasonable one.

The answer of the respondent further contains a general denial of all matters in the petition not admitted in said answer to be true.

### III. Motion for Judgment on the Pleadings.

No reply was filed by the relator and upon the issues joined in the petition and answer the relator moved for judgment on the pleadings. (Rec., p. 12.)

We submit that upon this record there is no warrant for the statement of plaintiff in error that "Respondent filed an answer admitting all the facts alleged in the petition" (Brief, p. 2). Not only did the respondent not admit the allegations, he specifically denied one of the basic facts of plaintiff in error's action, upon which his alleged right to the protection of the British treaty depends, viz., that relator was a subject of the King of England. (Rec., p. 11.)

Nor are there anywhere in the record allegations supporting the statements in the plaintiff in error's brief relating to the content of the "license" chapter of the Cincinnati Code of Ordinances. (Brief, p. 2, first par.) Only Ordinance No. 76-1918 was pleaded and this is the only one before the court. No citation of authorities is necessary on the point that this court cannot take judicial notice of municipal ordinances. We shall see later how plaintiff in error has forgotten this rule in his argument.

The plaintiff in error has also failed to point out in his brief the affirmative allegations of the answer setting forth the facts relating to the local conditions in Cincinnati under which pool rooms are conducted and their operation by aliens. These facts were pleaded in justification of the ordinance and they cannot be ignored by plaintiff in error.

## ARGUMENT

### I.

### The Plaintiff in Error Is Not Entitled to the Protection of the British Treaty.

The first point relied upon by the plaintiff in error (Rec., p. 21, Brief, p. 3) is that the ordinance violates the treaty of commerce between the United States and Great Britain whose protection is invoked, particularly the "national treatment" and "most favored nation" clauses thereof.

#### A.

*The Plaintiff in Error Is Not a British Subject and Therefore Is Not Entitled to the Protection of the British Treaty.*

We submit that upon the record before the court the plaintiff in error is not entitled to the protection of the British treaty. By his motion for judgment on the pleadings plaintiff in error chose to submit his case upon the facts pleaded in the petition and answer, admitting all of the facts alleged in the answer.

Ohio General Code, Section 11601.
1 Bates Pleading and Practice (Ohio), 426-427.
31 Cyc., 606.
*Dailey* v. *Chappell,* 12 O. C. C. (N. S.), 561, 565.
*Rheinheimer* v. *Ins. Co.,* 77 O. S., 360, 372.
*McCoy* v. *Jones,* 61 O. S., 119.
*Railroad Co.* v. *Nobil,* 85 O. S., 175.

The petition alleged that plaintiff in error was a subject of the King of England. The answer denied that allegation. Upon motion for judgment the fact now be-

fore the court is that plaintiff in error is not a British subject. This is not merely because plaintiff in error has failed to offer any evidence to sustain the burden of proof; he has by his motion actually admitted that he is not a subject of Great Britain.

*Walling* v. *Brown,* 9 Idaho, 184, 72 Pac., 960.

It is elemental to say that only a British subject is entitled to the protection of the British treaty and that since plaintiff in error is not before the court as such a subject he cannot invoke that treaty for his protection.

It is no answer to this argument to point out that defendant admits that the license was refused "by reason of the statement of relator * * * that he was a subject of the King of England." (Rec., p. 11.) This is important as showing why the license was refused but it does not help plaintiff in error to prove that he actually is a British subject. The fact that he "stated" that he was such and was refused a license because of such statement is no evidence of the correctness of his claim.

We submit, therefore, that upon the record plaintiff in error is not a subject of the King of England and therefore is not entitled to the protection of the treaty with Great Britain.

B.

*The British Treaty Does Not Protect the Operation of a Pool Room.*

The above, we believe, sufficiently answers the first contention of plaintiff in error but since the supreme court of Ohio in its opinion (Rec., p. 15) and plaintiff in error in his brief (Brief, pp. 4-15) discuss the British

Treaty we shall reply briefly, assuming, for the sake of argument, that plaintiff in error actually is a British subject.

Neither the record nor the brief disclose the particular treaty relied upon but following the opinion of the Ohio Supreme Court we may conclude that the "Convention to Regulate the Commerce Between the Territories of the United States and His Britannic Majesty" is meant (8 United States Statutes at Large, Foreign Treaties, p. 228). This treaty was adopted July 3, 1815, and has been continued in force by subsequent conventions in the same language.

The full text of the treaty is quite lengthy and will not be quoted here but the only article that could possibly apply to the instant case reads as follows:

> "Art. I. There shall be between the territories of the United States of America, and all the territories of his Britannic majesty in Europe, a reciprocal liberty of commerce. The inhabitants if the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

This treaty provides for a "reciprocal liberty of commerce" and that "the merchants and traders of each

nation, respectively, shall enjoy the most complete protection and security for their commerce."

We submit that the operation of pool tables is not "commerce" and that the operator of a pool room is not a "merchant" or "trader."

1.

Plaintiff in error in his brief (pp. 5-6) devotes some space to an argument based upon certain alleged language in the Cincinnati ordinances purporting to define the operation of billiard tables as a business or trade. Again we must point out that there is no such evidence in this case. The ordinances referred to were not referred to in the pleadings nor offered in evidence. Since the court cannot take judicial notice of their alleged existence they cannot be considered. Nowhere in the record is there reference to any definition by the defendant in error or by the city and there can therefore be no estoppel as claimed by plaintiff in error.

2.

Coming now to legal definitions of the term "commerce," "merchant" and "trader," we submit the following authorities:

*Bouviers Law Dictionary* (Ed. 1897):

> "Commerce—The various agreements which have for their object facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit."
>
> "Merchant—One who is engaged in the purchase and sale of goods."

*May* v. *Sloan*, 101 U. S., 231, 237:

> "The word 'trade' in its broadest signification includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce or traffic generally."

*Jackson* v. *Town of Union*, 82 Conn., 266:

> "The owning, controlling, and leasing of theaters, and the producing of plays and entertainments, and the booking of contracts for the production of plays, is not 'trade or commerce,' within the Penal Code, Section 168, subds. 5, 6, prohibiting a conspiracy to commit any act injurious to 'trade or commerce.' *People* v. *Klaw*, 106 N. Y. Supp., 341, 350, 55 Misc. Rep., 72 (citing Webst. Dict.; Stand. Dict.; 2 Bouv. Law Dict., 1127; Jac. Law Dict.; *United States* v. *Cassidy*, 67 Fed., 698; *United States* v. *Coal Dealers' Assn.*, 85 Fed., 252; *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.), 1, 6 L. Ed., 23; *Henderson* v. *New York*, 92 U. S., 259, 23 L. Ed., 543; *Welton* v. *Missouri*, 91 U. S., 275, 23 L. Ed., 347; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S., 465; 24 Ed., 527)."

Much reliance is placed by plaintiff in error upon the case of *Asakura* v. *City of Seattle*, 265 U. S., 332. We distinguish that case upon the following grounds.

a. The Japanese treaty invoked in that case is much more specific in its terms than is the British treaty. It provides in part that "The citizens of each of the high contracting parties shall have liberty * * * to carry on trade, wholesale and retail * * * and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects." (37 Stat. at Large, 1504.) No such comprehensive language is found in the British treaty, and it is not necessary to give it such a broad construction.

b. The Seattle Ordinance was shown to define pawnbrokers as carrying on a "business." This further warranted including pawnbroking in the term trade. In the case at bar the Cincinnati Ordinance contains no such definition of the operation of billiard tables.

c. There is a vital difference between lending money on collateral security as does a pawnbroker and renting the use of a billiard or pool table. The former has always been recognized as a legitimate form of business subject to regulation but not to prohibition. The latter has always been regarded by the law as a privilege subject to either regulation or prohibition under the police power of the states.

*Murphy* v. *California*, 225 U. S., 623, 630.

Pawnbroking is a part of the commercial, economic life of society. The renting of the privilege of playing billiards or pool is an amusement which may be suppressed entirely if necessary for the public safety, health or morals.

We submit, therefore, that even if we were to assume for the sake of argument that plaintiff in error actually is a British subject entitled to the protection of the British treaty, the terms of that treaty do not cover the maintenance and operation of billiard and pool tables.

## II.

### The Ordinance Does Not Deny to the Plaintiff in Error the Equal Protection of the Law.

The second point relied upon by plaintiff in error (Rec., p. 21, Brief, p. 15) is that the Cincinnati Ordinance is void and in contravention of Section One of

the Fourteenth Amendment to the Constitution of the United States, in that it denies to him and other aliens the equal protection of the law.

## A.

### *The Ordinance Is a Valid Exercise of the Police Power of the City.*

Plaintiff in error does not question the right of the city to pass an ordinance regulating or prohibiting the operation of pool and billiard tables. We wish to point out specifically, however, how broad are these powers.

Under the Ohio Constitution a city has so called "Home Rule Powers."

*Ohio Constitution,* Art. XVIII, Sec. 3:

> "Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws."

It is well established in the Ohio law that under this provision the powers of municipalities are derived from the people through the constitution and not through the legislature.

*Billings* v. *Cleveland Ry. Co.,* 92 O. S., 478.
*Fitzgerald* v. *Cleveland,* 88 O. S., 338.

The state of Ohio has never attempted to prohibit or regulate pool rooms and therefore the police power in this respect is entirely in the city.

## B.

### *Under the Police Power the City Has the Power to Prohibit Entirely the Operation of Pool Rooms.*

Since, as we have seen, the city exercises the police power over pool rooms, its power to prohibit them entirely has been sustained in many reported cases.

In *Murphy* v. *California*, 225 U. S., 623, the validity of an ordinance of the city of South Pasadena prohibiting the operation of pool rooms except in hotels was passed upon. The court held that such a prohibition was constitutional and that although playing at billiards was not a nuisance *per se* * * * "it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant" (p. 629). The court then quotes with approval the following language from *Booth* v. *Illinois*, 184 U. S., 425, 429:

> "If looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless looking through the forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

The court then continues:

> "Under this principle ordinances prohibiting the keeping of billiard halls have many times been sustained by the courts. *Tanner* v. *Albion*, 5 Hill, 121; *City of Tarkio* v. *Cook*, 120 Mo., 1; *City of Clearwater* v. *Bowman*, 72 Kan., 92; *City of Corinth* v. *Crittenden*, 94 Miss., 41; *Cole* v. *Village of Culbertson*, 86 Neb., 160; *Ex parte*

*Jones*, 97 Pac., 570.

"Indeed, such regulations furnish early instances of the exercise of the police power by cities, for Lord Hale in 1672 (2 Keble, 846), upheld a municipal by-law against keeping bowling alleys because of the known and demoralizing tendency of such places."

The case at bar presents a peculiarly strong case for the exercise of the police power of the city. The city in its answer alleged certain facts relating to pool and billiard halls in Cincinnati. These facts are admitted to be true by the plaintiff in error. They are (Rec., p. 11):

1. Pool and billiard halls in Cincinnati are meeting places of idle and vicious people.

2. They are the means of contributing to juvenile delinquency.

3. Numerous crimes and offenses have been committed therein.

4. They are frequented by law-breakers and an undesirable class of persons.

5. They require the most strict surveillance on the part of the police.

Such are the admitted facts with reference to the conduct of pool rooms in Cincinnati. We submit that they offer specific evidence of the "harmful tendency" of which this court seems to have taken judicial notice in *Murphy* v. *California*, *supra*, at p. 629.

We therefore submit that under its police power and in view of the admitted facts as to the evils arising from the operation of pool rooms in Cincinnati, the city had full power to regulate or prohibit their operation.

C.

*The Mere Fact of Classification of Those to Whom a Law Applies Does Not Violate the Equal Protection Clause of the XIV Admendment So Long As All In the Same Class Are Treated Alike.*

The ordinance in question clearly creates two classes with reference to the operation of pool rooms. Aliens may not be granted a license; citizens of the United States may secure the privilege. There is no claim that within these classes there is not equal protection of the laws.

This court has in many cases held that the states have the right to recognize classes of persons or property in applying their laws.

In *Cockrill* v. *California*, 268 U. S., 258, 262, the court held:

> "The equal protection clause does not require absolute uniformity or prohibit every distinction in the laws of the state between ineligible aliens and other persons within its jurisdiction. The state has a wide discretion and may classify persons on bases that are reasonable and germane, having regard to the purpose of the legislation."

*Truax* v. *Corrigan*, 257 U. S., 312, 337:

> "In adjusting legislation to the need of the people of a state, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary * * *."

*Terrace* v. *Thompson*, 263 U. S., 197, 218.

> "Classification is the most inveterate of our reasoning processes. We can scarcely think or

> speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real semblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand."

See also

*Barrett* v. *Indiana*, 229 U. S., 26, 29.
*Singer Sewing Machine Co.* v. *Brickell*, 233 U. S., 304.
*Patsone* v. *Pennsylvania*, 232 U. S., 138.

We conclude, therefore that classification does not violate the equal protection guaranteed by the constitution so long as the classes created are on a basis that bears a reasonable relation to the purpose of the legislation.

D.

*The Court Will Not Disturb a Law Providing for Classes of Persons Unless It Can Clearly Hold That There Is No Reasonable Basis for the Classification.*

The courts have always been slow to hold that a legislative enactment was invalid, particularly where the law required a knowledge of local conditions which were attempted to be remedied.

In *M. K. & T. Ry. Co.* v. *May*, 194 U. S., 267, the court says, p. 269:

> "When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for

the law that would not require with equal force its extension to others whom it leaves untouched."

*Barrett* v. *Indiana*, 229 U. S., 26, 29:

"The equal protection of the law requires laws of like application to all similarly situated but in selecting some classes and leaving out others the legislature, while it keeps within this principle, is, and may be, allowed wide discretion. It is the province of the legislature to make laws and of the courts to enforce them. This court has had such frequent occasion to consider this matter that extended discussion is not necessary now. The legislature is permitted to make a reasonable classification and before a court can interfere with the exercise of its judgment it must be able to say 'that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' "

*Patsone* v. *Pennsylvania*, 232 U. S., 138, 144:

"But we start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience * * *. The state 'may direct its laws against what it deems the evil as it actually exists without covering the whole field of possible abuses' (citing authorities). The question therefore narrows itself to whether this court can say that the legislature of Pennsylvania was not warranted in as-

suming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent.

"*Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts. Adams* v. *Milwaukee*, 228 U. S., 572, 583. *If we might trust popular speech in some states it was right—but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong.*" (Italics ours.)

See also:

*Crescent Cotton Oil Co.* v. *Miss.*, 257 U. S., 129, 137.

*Middleton* v. *Texas Power & Light Co.*, 249 U. S., 152, 157.

*Rast* v. *Van Deman*, 240 U. S., 342, 357.

*Keokee Consol. Coke Co.* v. *Taylor*, 234 U. S., 224, 227.

## E.

### *A Classification on the Basis of Citizenship Has Been Recognized as Within the Equal Protection Clause and as a Reasonable Basis for Distinction.*

The real substance of this controversy lies in the aptness and reasonableness of creating a class on the basis of citizenship. Defendant in error in his answer has alleged the justification for such a classification and insofar as facts are pleaded this justification must now be considered as admitted.

The answer alleged (Rec., p. 11):

"Respondent further says that as a class, persons who are not citizens of the United

> States are not as familiar with the laws and customs of the United States as are native born or naturalized citizens thereof, and that billiard and pool rooms and halls maintained by persons who are not citizens of the United States are therefore, a menace to society at large and the welfare of the public; that the ordinance complained of by the relator is a reasonable police regulation passed in the interests and for the benefit of the general public; and that said ordinance is a reasonable ordinance."

The Supreme Court of Ohio has twice passed upon the constitutionality of this ordinance. In *Balli* v. *Carrel*, 99 O. S., 285, decided in 1919 it held the ordinance constitutional and also in the present case decided in 1925. It is clear, therefore, that the question has received ample consideration by that court.

The precise justification pleaded in this case has received the approval of this court in *Terrace* v. *Thompson*, 263 U. S., 197.

In that case the Washington Alien Land Law was in question which prohibited aliens who had not in good faith declared their intention to become citizens from owning land. It was claimed that this denied to aliens the equal protection of the law. At page 220 this court says:

> "The classification is based on eligibility and purpose to naturalize * * * Congress is not trammeled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The state properly may assume that the considera-

tions upon which Congress made such classification are substantial and reasonable * * *. The rule established by Congress on this subject in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. We agree with the court below * * * that:

"'*It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries*' * * *." (Italics ours.)

In *Patsone* v. *Pennsylvania*, 232 U. S., 138, this court held that a Pennsylvania statute making it unlawful for unnaturalized foreign born residents to kill wild game was not unconstitutional as denying equal protection of the law.

This court has held in several cases that a classification based upon citizenship was a valid one and did not deny equal protection of the law.

In *Cockrill* v. *California*, 268 U. S., 258, the court passed upon the constitutionality of a statute providing that a conveyance of real property was void if the interest conveyed was such that an alien is inhibited from possessing it; and that if the consideration was paid by an alien there should be a *prima facie* presumption of intent to avoid the statute. The court held the statute constitutional, saying, page 261:

"The statute is not repugnant to the equal protection clause * * *. Plaintiffs in error maintain that invalidity results from the fact that, where payment of the purchase price is made by an ineligible alien, the law creates a

> presumption of a purpose to prevent, evade or avoid escheat, while no such presumption arises where such payment is made by a citizen or eligible alien. But there are reasonable grounds for the distinction * * *. The fact that in California all privileges in respect of the acquisition, use and control of the land for agricultural purposes are withheld from ineligible Japanese constitutes a reasonable and valid basis for the rule of evidence."

In *Porterfield* v. *Webb*, 263 U. S., 225 the court held that the California Alien Land Law did not deny equal protection of the law. At page 233 the court says:

> "In the matter of classification, the states have wide discretion. Each has its own problems, depending on circumstances existing there. It is not always practical or desirable that legislation shall be the same in different states. We cannot say that failure of the California legislature to extend the prohibited class so as to include eligible aliens who have failed to declare their intention to become citizens of the United States was arbitrary or unreasonable."

See also:

*Webb* v. *O'Brien*, 263 U. S., 313.
*Frick* v. *Webb*, 263 U. S., 326.

The case of *Anton* v. *Van Winkle*, 297 Fed., 340 (District Court D. Oregon) is a case involving the precise question raised in the case at bar. The Oregon laws prohibited the issuance of a pool or billiard hall license to any person not a citizen of the United States. The court held that this law did not violate the equal protection clause of the XIV Amendment.

Wolverton, District Judge says, page 342:

> "It may be judicially known, however, that aliens coming into this country are without the intimate knowledge of our laws, customs, and usages that our own people have. So it is likewise known that certain classes of aliens are of different psychology from our fellow countrymen. Furthermore, it is natural and reasonable to suppose that the foreign born, whose allegiance is first to their own country, and whose ideals of governmental environment and control have been engendered and formed under entirely different regimes and political systems, have not the same inspiration for the public weal, nor are they as well disposed toward the United States, as those who, by citizenship, are a part of the government itself. Further enlargement is unnecessary. I have said enough so that obviously it cannot be affirmed with absolute confidence that the legislature was without plausible reason for making the classification, and therefore appropriate discrimination against aliens as it relates to the subject of legislation. Much less can it be said that the enactment of the law complained against is a clear, unmistakable infringement of plaintiff's constitutional rights."

In *Gizzarelli* v. *Presbery*, 44 R. I., 333, the court considered an ordinance of the city of Providence providing that a license to operate a motor bus should not be granted to an alien. The court says, page 335:

> "Due consideration for the safety of the public requires that a careful selection should be made of the individuals to whom authority is given to use the public highways as carriers of passengers for hire. We think fairly it may be

> said that as aliens as a class are naturally less interested in the state, the safety of its citizens and the public welfare than citizens of the state, to allow them to operate motor busses would on the whole tend to increase the danger to passengers and to the public using the highways. It is clear that we cannot say that the evil to be apprehended and the purposed remedy are so dissociated as to warrant the court in holding the ordinance to be invalid."

In *Peter Miller* v. *City of Niagara*, 207 App. Div., N. Y., 798, the court held that an ordinance prohibiting the issuance of a license to an al n to sell soft drinks did not violate the XIV Amendment. At page 800 the court says:

> "When we consider that the licensing at retail of the beverages mentioned in this act is based upon the theory that there is an evil to be guarded against, that connected with such business there are apt to be violations of the law * * * it may reasonably be said that the welfare of the community will be best served by excluding from licenses such persons as are not so attached to the institutions of our country as to be in the class of its citizenry. Under the principles stated then, we deem the classification valid."

In *State* v. *Rheaume*, 116 Atl. (N. H.), 758, the New Hampshire court held, Syl. 8:

> "Laws 1917c. 185 Secs. 6, 7, making it unlawful for one not a citizen of the United States and who has not declared his intention of becoming such to have firearms in his possession, is not in violation of Const. U. S. Amend. 14 relating to due process and denying equal pro-

tection of the laws, without regard to nationality, since such provision was not intended to interfere with the exercise of the police power by the states, and the statute does not make an unreasonable classification."

At page 763 the court says:

"Citizens as a class have more settled domiciles and are better known to the local police, officials, while the sojourn of aliens in this country, in theory, and usually in practice, is temporary, and their abode, while here, capricious and uncertain. Citizens by means of taxation bear the expense of the government and of police protection, while the alien does not necessarily pay any part of the public burden. Native citizens are justly presumed to be imbued with a natural allegiance to their government which unnaturalized aliens do not possess. The former inheret a knowledge and reverence for our institutions, while the latter as a class do not understand our customs or laws, or enter into the spirit of our social organization * * *. It is clear that there exists a reasonable and substantial basis for the classification."

In *Commonwealth* v. *Hana*, 195 Mass., 262, a Massachusetts statute provided that an alien could not procure a license as a hawker or peddler. It was contended that this denied to aliens the equal protection of the law.

The court said, page 265:

"If in the same interest (exercise of the police power) the legislature deems it important that licenses shall be granted only to citizens of the United States or to those who have declared their intention to become citizens, it

> can hardly be said that they have exceeded their constitutional right in passing a law to that effect * * *. (Quoting from *Trageser* v. *Gray*, 73 Md., 250, to the effect that aliens are not so apt to have regard for the welfare of the state, etc.) The same reasoning is equally applicable to the granting of licenses to hawkers and peddlers. Indeed, the nature of their business is such that their possession of a domicile and citizenship in this country might be important to those seeking remedies for wrongs done in their business * * *."

These cases follow the long line of decisions of this court justifying legislation that classifies on various bases. Without further quotation we shall confine ourselves to enumerating some of the various decisions.

In *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S., 304, this court held reasonable and constitutional an Alabama law classifying for license purposes the selling of sewing machines as between those sold through itinerant agents and those sold by merchants at "regular established places of business."

In *M. K. & T. Ry. Co.* v. *May*, 194 U. S., 267, a law prohibiting railroad companies from allowing Johnson grass and Russian thistle to go to seed on their right of way was held not to deny equal protection of the law.

In *Barrett* v. *Indiana*, 229 U. S., 26, the court held that a law applying to bituminous coal mines but not to block coal mines did not deny equal protection of the law.

In *Ohio, ex rel. Lloyd*, v. *Dollison*, 194 U. S., 445, the court held that an Ohio local option law excepting druggists, manufacturers and persons giving away liquor from its operation was valid under the XIV Amendment guaranteeing equal protection of the law.

Plaintiff in error seeks to distinguish cases involving statutes prohibiting or regulating the sale of liquor on the ground that that business is one peculiar to itself which might be wholly prohibited (Brief, p. 14). We submit that operating pool rooms is within that class of "non-useful" occupations that may be regulated or prohibited according to local conditions and that under the admitted facts of this case as to the evils resulting from their operation in Cincinnati, the city under its police power could refuse to grant any license.

This court in *Murphy* v. *California*, 225 U. S., 623, held that pool rooms were "non-useful occupations which may or may not be harmful to the public, according to local conditions or the manner in which they are conducted" and that "the regulation or prohibition need not be postponed until the evil has become flagrant" (629). The court therefore held that a law prohibiting pool rooms was constitutional.

In *Booth* v. *Illinois*, 184 U. S., 425, the court considered an Illinois statute prohibiting options in grain futures. The same contention was made as in the instant case, that such options were not immoral *per se*. At page 429 the court said on this point:

> "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be toward that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particuler calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say

> that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler* v. *Kansas*, 123 U. S., 623, 661; *Minnesota* v. *Barber*, 136 U. S., 313, 320; *Brimmer* v. *Rebman*, 138 U. S., 78; *Voight* v. *Wright*, 141 U. S., 62."

*Anton* v. *Van Winkle*, 297 Fed., 340, a case where pool room licenses were refused to aliens, follows these cases and holds, page 342:

> "If, in the light of these authorities, the statute in question had been for a prohibition of the business of maintaining billiard or pool halls, considering the character of the occupation as having a harmful or noxious tendency, there could be no question of the power of the legislature to ordain such prohibition under its police power."

We submit that under these authorities and the facts of this case the operation of pool rooms is such an occupation in Cincinnati that the city could prohibit the granting of licenses. This brings our case within the decisions relating to the liquor traffic.

In *Bloomfield* v. *Ohio*, 86 O. S., 253, the court considered the constitutionality of the Dean law providing that a liquor license could not be granted to an alien. The court held, page 266:

> "We do not think the statutes of Ohio, and of other states, which have barred aliens from the liquor traffic in the manner stated have arisen from a spirit of race hatred or inhospitality, or a purpose to deny the equal protection of our laws or equal opportunity under

> our institutions. But they are based on the belief that an alien cannot be sufficiently acquainted with our institutions, and our life to enable him to appreciate the relation of this particular business to our entire social fabric. When he has become more familiar with the spirit of the American people and their laws and has become a citizen, he will easily and readily (in the conduct of this business) assist in the furtherance of the policy of the state."

The case of *Tragesser* v. *Gray*, 9 L. R. A. 780 has become a leading case on this question. A Maryland statute provided that a license to sell liquor could be issued only to citizens of the United States of temperate habits and good moral character. The court held:

> "Syl. 2: A state's denial to persons not citizens of the United States of the right to obtain licenses to sell spiritous liquors within its borders is not a discrimination against them, or an abridgement of their rights within the prohibition of the XIV Amendment of the Constitution of the United States."

The Maryland court held at p. 784:

> "It was thought proper to confine the licenses to citizens of the United States of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. It therefore seemed wise to the Legislature to confer it only on those who being natives of the country, might reasonably be supposed to have a regard for its welfare; or who not being natives had,

as required by Naturalization Law, proven by creditable testimony before a court of justice that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness. It was certainly the function of the law-making department to exercise its judgment on this question, and this court has no right to criticize its conclusions. We do not think that this law is, in any manner, in conflict with the Constitution of this state."

* * * * * * * *

"It has been uniformly held in all courts that no clause in the Federal Constitution interferes with the power of the states to promote and protect the public health, peace, morals, and good order within their respective limits."

We submit, therefore, that the ordinance does not deny to Plaintiff in Error the equal protection of the laws; that acting under its police powers the city had the right to regulate or prohibit entirely the operation of pool rooms and that in exercising those powers it could classify those to whom licenses could be issued. In determining the reasonableness of a particular classification created by law the courts will recognize that the question is one of local experience and will not hold the classification unconstitutional unless they can hold that the basis upon which classes are created is an unreasonable one and not germane to the evil sought to be remedied. We have seen that the evils attendant upon the operation of pool rooms in Cincinnati are admitted and with this in mind, as well as the allegations of Defendant in Error relating to the operation of pool rooms by aliens, we submit that upon the authorities cited the distinction drawn

by the ordinance between aliens and citizens cannot be said to be an unreasonable exercise of the police power or to bear no relation to the control and correction of the conditions sought to be remedied.

## III.

### Plaintiff in Error's Rights Under the British Treaty and Under the XIV Amendment are the Same.

Thus far we have discussed this case as though there were two distinct issues involved. We have done so only because Plaintiff in Error chose to present his case in that manner. We submit, however, that whether Plaintiff in Error claims the protection of the British treaty of 1815 or of the equal protection clause of the XIV Amendment to the Constitution the same question is raised,—does the ordinance deny to aliens the equal protection of the law. The British treaty at the most guarantees to British subjects the same rights accorded to "other foreigners" and by the broadest possible construction its only grants to them the "most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries respectively." The XIV Amendment, applying as it does to aliens as well as citizens, really gives a more comprehensive right which embraces and overshadows the rights granted by the treaty. At the same time the treaty rights are expressly made subject to the Constitution. So that whether we approach this question from the point of view of the treaty or from the point of view of the Constitution, we come to the fundamental question of the validity of the classification created by the ordinance. If that

classification be valid under the Constitution it is valid under the terms of the British treaty of 1815.

## IV.

### Summary.

In conclusion, we submit that the fundamental question in this case is whether the classification created by the ordinance is a valid one. Plaintiff in Error has failed to establish his status as a British subject and is therefore not entitled to the protection of the treaty; nor does the language of the British treaty cover such a non-useful occupation as operating pool and billiard halls. The Plaintiff in Error's rights are measured by the Constitution rather than the treaty since the treaty rights are expressly made subject to the Constitution.

Under the XIV Amendment, the ordinance offers aliens the equal protection of the laws. The Amendment does not deny to the States the exercise of their police power and, as we have seen, in the case of pool rooms the Constitution of Ohio vests the police power in the city. The operation of pool rooms in general, and particularly under the admitted facts of this case, calls for an exercise of the police power by the city either by way of regulation or prohibition. The City Council has, in its legislative discretion, sought to meet this situation by limiting the permission to operate to citizens of the United States and the courts will not disturb such a classification of persons unless it can be held that the basis of classification is clearly unreasonable and bears no relation to the conditions the council seeks to control. We have seen that in general aliens are not accustomed to American institutions, do not comprehend our social problems nor

understand our laws and traditions. Courts have in many cases cited herein held that these considerations offer a basis for distinction between alien and citizen that will not be held unwarranted by the XIV Amendment.

We submit, therefore, that the Supreme Court of Ohio was not in error in refusing to grant Plaintiff in Error's petition for mandamus and that the judgment of that court should be affirmed.

*Respectfully submitted,*
JOHN D. ELLIS,
*City Solicitor of Cincinnati, Ohio.*

# SUPREME COURT OF THE UNITED STATES.

No. 272.—October Term, 1926.

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| The State of Ohio *ex rel* James Clarke, Plaintiff in Error, *vs.* Alfred F. Deckebach, as Auditor of the City of Cincinnati. | In Error to the Supreme Court of the State of Ohio. |

[May 16, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

An ordinance, No. 76-1918, of the City of Cincinnati, requires the licensing of pool and billiard rooms, and prohibits the issue of licenses to aliens. Plaintiff in error petitioned the Supreme Court of Ohio for a writ of mandamus commanding defendant in error, the auditor of Cincinnati, to grant him a license to conduct a billiard and pool room in that city. The petition alleged that plaintiff was a subject of the King of England and that he had been refused a license solely because he was not a citizen. It drew in question the validity of the ordinance as violating Art. I of the treaty between Great Britain and the United States of July 3, 1815, 8 Stat. 228; August 6, 1827, 8 Stat. 361; 1 Malloy, Treaties, 624, 645, and as denying the equal protection of the laws guaranteed by the Fourteenth Amendment.

Defendant answered, traversing the allegation of citizenship, and asserting that billiard and pool rooms in the City of Cincinnati are meeting places of idle and vicious persons; that they are frequented by lawbreakers and other undesirable persons, and contribute to juvenile delinquency; that numerous crimes and offenses have been committed in them and consequently they require strict police surveillance; that non-citizens as a class are less familiar with the laws and customs of this country than native born and naturalized citizens; that the maintenance of billiard and pool rooms by them is a menace to society and to the public welfare,

and that the ordinance is a reasonable police regulation passed in the interest of and for the benefit of the public.

On plaintiff's motion, the Supreme Court of Ohio gave judgment on the pleadings, dismissing the petition. 113 Ohio St. 347. In an earlier case, *State ex rel Balli* v. *Carrel*, 99 Ohio St. 285, it had held that the ordinance in question did not deny any rights guaranteed by the Federal Constitution. The case comes here on writ of error, Jud. Code, § 237 as amended, the plaintiff renewing here the contentions made below.

At the outset defendant insists that plaintiff has not established that he is entitled to the benefit of the treaty since his allegation of citizenship is not admitted on the face of the pleadings. But the Supreme Court of Ohio has construed the pleadings as sufficient to draw in question the validity of the ordinance under the treaty. Hence we need not concern ourselves with those refinements of the local law of pleading which, it is said, enable defendant to justify his refusal to issue a license because of plaintiff's assertion of British citizenship, and at the same time deny that plaintiff has established citizenship entitling him to the protection of the treaty. See *Forsyth* v. *Vehmeyer*, 177 U. S. 177, 180; *Allen* v. *Alleghany Co.*, 196 U. S. 458, 465, 466; *Atlantic Coast Line R. R.* v. *Mims*, 242 U. S. 532, 535; *Nevada-California-Oregon Ry.* v. *Burrus*, 244 U. S. 103; *Lee* v. *Central of Georgia Ry.*, 252 U. S. 109.

The application of the treaty to the present case requires but brief consideration. As stated in the title its purpose is "to regulate the commerce" between the two countries. Article I, which it is said affords the protection against the present discrimination, is printed in the margin.[1] It guarantees "reciprocal liberty of commerce" between the territories of the signatories. The

[1] "Art. I. There shall be between the territories of the United States of America, and all the territories of his Britannic majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

privileges secured by it to the inhabitants of the two countries, so far as relevant to the present controversy, pertain to and are intended to facilitate commerce. The clause suggested as pertinent reads: "and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce". Even if assumed, as argued, that the proprietor of a pool room may for some purposes be regarded as engaged in a trade, the word being used as synonymous with occupation or employment, he does not engage in commerce within the meaning of a treaty which merely extends to "merchants and traders" "protection and security for their commerce". See *Bobe* v. *Lloyd*, 10 Fed. (2d) 730, 734. It would be an extravagant application of the language quoted to say that it could be extended to include the owner of a place of amusement who does not necessarily buy, sell or exchange merchandise or otherwise participate in commerce.

*Asakura* v. *Seattle*, 265 U. S. 332, relied on by plaintiff, does not support his contention. It was there held that the treaty with Japan of February 21, 1911, 37 Stat. 1504, was violated by a municipal ordinance prohibiting the granting of pawnbrokers' licenses to non-citizens. That treaty secured to the citizens of Japan the right to "enter, travel and reside" in the United States and "to carry on trade, wholesale and retail . . . and generally to do anything incident to or necessary for trade". This language, which is plainly broader in some respects than that of the British treaty, was held to embrace within its protection a Japanese pawnbroker whose business, in contrast to that of plaintiff, necessarily involved the lending of money on the security of merchandise and the sale of merchandise when necessary to realize on the security.

The objections to the constitutionality of the ordinance are not persuasive. Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Truax* v. *Raich*, 239 U. S. 33; *In re Tiburcio Parrott*, 1 Fed. 481; *In re Ah Chong*, 2 Fed. 733; *Ho Ah Kow* v. *Nunan*, 5 Sawy. 552, 12 Fed. Cases, #6546; *Wong Wai* v. *Williamson*, 103 Fed. 1; *Fraser* v. *M'Conway & Torley Co.*, 82 Fed. 257, it does not follow that alien race and allegiance may not bear in some instances such a relation to a legiti-

mate object of legislation as to be made the basis of a permitted classification. *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Crane* v. *New York,* 239 U. S. 195, 198; *Terrace* v. *Thompson,* 263 U. S. 197; *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263 U. S. 313; *Frick* v. *Webb,* 263 U. S. 326; *Cockrill* v. *California,* 268 U. S. 258; cf. *McCready* v. *Virginia,* 94 U. S. 391.

The admitted allegations of the answer set up the harmful and vicious tendencies of public billiard and pool rooms, of which this Court took judicial notice in *Murphy* v. *California,* 225 U. S. 623. The regulation or even prohibition of the business is not forbidden. *Murphy* v. *California, supra.* The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. We cannot say that the city council gave unreasonable weight to the view admitted by the pleadings that the associations, experiences and interests of members of the class disqualified the class as a whole from conducting a business of dangerous tendencies.

It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. *Fort Smith Light & Traction Co.* v. *Board of Improvement,* decided this day.

Some latitude must be allowed for the legislative appraisement of local conditions, *Patsone* v. *Pennsylvania, supra,* 144; *Adams* v. *Milwaukee,* 228 U. S. 572, 583, and for the legislative choice of methods for controlling an apprehended evil. It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods. See *Westfall* v. *United States,* decided this day.

***Judgment affirmed.***

**A true copy.**

**Test:**

***Clerk, Supreme Court, U. S.***